JP

IN THE COURT OF APPEAL FOR ZAMBIA **App No. 137/138 of 2019**

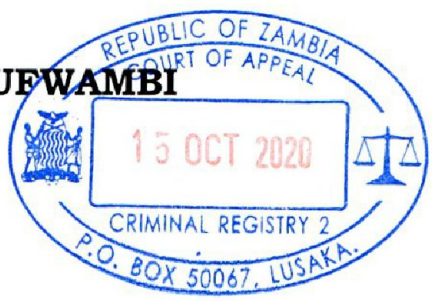
HOLDEN AT KABWE

(*Criminal Jurisdiction*)

BETWEEN:

JACKSON MBANDAMA **1ST APPELLANT**

GIBSON SIAKABBULA MUFWAMBI **2ND APPELLANT**



AND

THE PEOPLE **RESPONDENT**

CORAM: Chisanga JP, Sichinga and Ngulube, JJA
On 19th May, 2020 and 15th October, 2020

For the Appellant: *Mr. C Siatwinda, Senior Legal Aid Counsel - Legal Aid Board*

For the Respondent: *Mrs S Kachaka, Senior State Advocate - National Prosecutions Authority*

JUDGMENT

Sichinga, JA, delivered the Judgement of the Court

Cases referred to:

1. ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172***
2. ***Nkhata and Four Others v The Attorney General (1966) Z.R. 124***

3. *William Muzala Chipango & Others v The People (1978) Z.R. 304*
4. *David Zulu Vs. The People (1977) ZR 151*
5. *Bwanausi v The People (1976) Z.R. 103*
6. *Chabala v The People (1976) Z.R. 14*
7. *Saluwema v The People (1965) ZR 4*
8. *Soondo v The People (1981) Z.R. 302*
9. *Peter Yotam Haamenda v The People (1977) ZR 184*
10. *Ilunga Kabala and John Masefu v The People (1981) 102*
11. *Machipisha Kombe v The People (2009) ZR 282*
12. *Felix Muleba and Sharon Muleba v The People App No. 23 and 24 of 2004 (unreported)*
13. *Joseph Mulenga and Albert Joseph Phiri v The People (2008) Z.R. 1 Vol. 2*
14. *Bornface Chanda Chola, Christopher Nyampande and Nelson Sichula v The People (1988-1989) ZR 163*
15. *Emmanuel Phiri and Others V The People (1978) Z.R. 79*
16. *Phiri and Others v The People (1973) ZR 47*
17. *Ezious Munkombwe and Others v The People CAZ No. 7,8,9 of 2017*

Legislation referred to:

1. ***Penal Code Act Cap. 87 Laws of Zambia***
2. ***Firearms Act Cap 110 Laws of Zambia***

1.0 Introduction

1.1 This is an appeal against the judgment of the High Court (Mulife J) convicting the appellants of aggravated robbery and murder contrary to **Sections 294(2) and 200 of the Penal Code**[1], respectively.

1.2 The particulars of the offence of aggravated robbery are that the appellants, on 2nd March, 2018 (the material day) in Choma District of Southern Province, armed with a firearm, jointly and whilst acting together with other persons unknown, stole K149,200.00 cash, the property of Clive Wixley and at or immediately after such stealing, used actual violence to the said Clive Wixley in order to obtain or retain the thing stolen to prevent or overcome resistance to its being stolen or retained.

1.3 Particulars of the offence of murder were that the appellants on the material day in Choma District of Southern Province jointly and whilst acting together with other persons unknown did murder Clive Wixley (the deceased).

2.0 Evidence in the court below

2.1 The prosecution's case rested on the evidence of nine witnesses. On 2nd March, 2018, PW1-Chrispin Daka was enroute driving to his house with others who were driving behind him when he reached the entrance to the deceased's farm. He found the gate closed and saw an empty Toyota Land Cruiser parked at the said entrance with the driver's door open and the engine still running. He hooted a few times to no avail. As PW1 and his companions attempted to open the gate, they saw a white blood stained hat on the ground near the Land Cruiser and they were gripped with fear. They drove back for three to four kilometers, then parked to call one Milden Choongo and narrated to him what they had seen. Milden Choongo later called PW1 and informed him that he had discovered that the deceased had been killed. PW1 then reported the incident to the police at Choma and returned to the crime scene with police officers.

2.2 PW2-Cryford Jolezya Hichaba a supervisor at the deceased's farm told the court that on the material day between 10-11 hours, he was informed by Milden Choongo of PW1's discovery at the gate. PW2 in the company of Milden Choongo then went to the gate to carry out an investigation. On the way the duo met the A1 driving a tractor. Then A1 also joined them on their way to the crime scene in the company of others. At the scene PW2 spotted the deceased's hat stained with blood.

He narrated that they found the deceased's body about 5 to 7 metres from the Land Cruiser, and he saw blood on the deceased's forehead. He then made efforts to call a neighbouring farmer, one Davis, and the deceased's brother, Guy Wixley, to no avail. He reported the matter to the police and learnt that officers had already been dispatched to the scene. He further told the court that he saw the deceased that morning and he appeared to be in good health. He said workers at the farm were scheduled to receive their salaries on the material day. He identified A1-Jackson Mbandama in the dock as a tractor driver at the deceased's farm.

2.3 Mike Chibeya-PW3, a cattle herder at the deceased's Duba 5 farm testified that on 15th January, 2018, A1-Mbandama asked him if he was interested in making some money. When he responded eagerly, A1 proposed the killing of the deceased at the time he would go to collect money for workers' salaries. A1 then tasked him to find a firearm to be used to murder the deceased. PW3 told the court that he did not want to reject A1's proposal in his face, so when he renewed his proposal on 26th January, 2018, PW3 told him that he had not yet secured a firearm. After the employees received their January salaries, A1 complained to PW3 that they had missed out on the money. On the material day, PW3 learned that the deceased had been killed. After work, A1 visited PW3 and told him that the proposal he had earlier made of killing the deceased was a joke. A1 then requested PW3 not to tell anyone about it.

PW3 said he assured A1 that he would not. He said A1 later told him that he would be paid K62,000.00 by his former employers. On 15th April, 2018, PW3 heard that A1 had been arrested in connection with the subject offences and he concluded that A1 indeed murdered the deceased as he had earlier proposed to do. He said this prompted him to disclose to the police A1's proposals.

2.4 Lister Mudenda-PW4, A1's sister, testified that on a date she could not recall, A1 visited her shop in the company of an unknown man, who gave A1 K10,000.00 in her presence. A1 informed his sister that the money was payment for a car that he had sold to the man. She told the court that out of the K10,000.00 he had received, A1 gave her K2,000.00 for her to settle his debt with Vision Fund, and also gave her an additional K100.00. Under cross-examination when it was suggested to PW4 by defence counsel that the incident she narrated transpired in February, she admitted, and also said that a police officer threatened to lock her up if she did not give a statement to the police.

2.5 Lilonga Chonga Hamoonga-PW5, a manager at First National Bank Choma Branch, testified that the deceased drew K149,200.00 on the material day between 08:30 to 09:00 hours. He produced a bank statement-P1 to that effect.

2.6 Detective Chief Inspector Daniel Banda-PW6, a ballistics expert at the Zambia Police Service Headquarters Forensics Department, testified that

on 3rd November, 2018 and 5th December, 2018, Detective Constable Kaoma and Detective Chief Inspector Siabona, both of Choma Police Station, submitted one bullet and an exhibit firearm of serial number 92022319 to the forensic department for examination, respectively. These were identified as exhibits P3 and P4 in the court below. The said exhibits had been examined by Detective Chief Inspector Wusiku, who at the time of trial, was on a peace keeping mission in Somalia. The latter wrote a report on her findings, which report was produced into court as exhibit P2.

2.6.1 Having witnessed the examination by Det. Inspector Wusiku, PW6 testified that the firearm was in good working condition because it discharged a test cartridge when the trigger was pressed. He also told the court that exhibit P4 is a caliber 18.5mm or 12 bore, and that exhibit P3 is a dangerous firearm capable of causing injury or death to any animal or human target once discharged. He also added that exhibit P4 had a deformed pellet because it struck a hard object.

2.7 Lawrence Habeenzu-PW7, an assistant manager at Stanbic Bank Choma Branch, testified that on 7th March, 2018, A1-Jackson Mbandama deposited K8,000.00 in his bank account at Stanbic Bank, as evidenced by a deposit slip marked as exhibit P5. He was unable to remember what A1 looked like, as he attended to numerous customers.

2.8 David Siabumpindu-PW8 testified that in February 2018, he bought a firearm from one Andrew Chibwe, his father-in-law, at K5,000.00. He had made an upfront payment of K3,000.00, leaving a balance of K2,000.00. As PW8 had no money when the balance fell due, Chibwe suggested that PW8 finds another buyer so that the duo should each recoup what was due to them upon selling the firearm. As such, PW8 approached one George Susu, who later informed him that his son Sadam Susu knew someone who was interested in buying a firearm. Sadam eventually met with PW8 and told him that the interested buyer was one Davy Siamutwa Ezuba, who was too busy to meet with PW8. Sadam suggested to take the firearm and show it to the said Ezuba. Upon some hesitation, PW8 said he acceded to Sadam's request after being assured by George Susu that Sadam would return the firearm. PW8 said he also spoke to Ezuba through Sadam's phone. PW8 thus handed the firearm to Sadam on 1st March 2018 in the presence of PW8's wife and young brother. Sadam, promised to revert to PW8 the following day.

2.8.1 PW8 further told the court that Sadam only reappeared after three days, during which period his phone was switched off. PW8 said Sadam informed him that Ezuba had decided not to proceed with the purchase of the firearm in preference to buying a hammer mill. Sadam then returned the firearm. PW8 subsequently informed his father-in-law about the failed sale. Chibwe decided to get back his firearm and refund PW8

the money he had paid as upfront payment for the intended purchase of the firearm.

2.8.2 PW8 further testified that on the 11th of a month he could not recall, Officer Kainga-PW9, in the company of A2-Gibson Mufwambi, apprehended him on allegations that the subject firearm was used to murder a white man in Choma District. That when PW8 asked A2 about the allegations, A2 confirmed that exhibit P3 was indeed the firearm which Sadam used to murder the white man and that Sadam had lied to PW8 that Ezuba was interested in buying it. PW8 then led the police to his father-in-law's place to collect exhibit P3. PW8 stated that he had known A2 as a neighbour for 18 years as they were from neighboring villages, and added that he did not know the whereabouts of Sadam and George Susu. PW8 confirmed that he had been held in police custody for four (4) days in connection to the subject allegations before he was released.

2.9 Detective Constable Justin Kainga-PW9 investigated the matter after receiving a report from PW1. He discovered the body of Clive Wixley about 5 metres from the gate in the bush facing down. The body had two bullet wounds on the right side of the head and on the neck. He found the deceased's vehicle parked at the main gate and spotted a jungle hat some 2 metres away from the gate. Det. Constable Kainga deposited the

deceased's body at Choma General Hospital Mortuary. An empty bottle of J. Black rum was also picked from the scene.

2.9.1 PW9 recounted similar testimony as that of PW1 and PW2 on location and state of the deceased's body. He further stated that a postmortem examination was conducted by one Dr, Tarras and a pellet-P4 was extracted from the deceased's skull. A postmortem report-P7 revealed that the deceased died as a result of head injuries.

2.9.2 In relation to the events that led to the arrest of the A1, PW9 stated that on the 8th of March, 2018, he received a call from one Astra Siasanda, who informed him that PW3-Mike Chibeya had information relating to the death of the deceased. That upon interviewing PW3, he informed him that A1-Jackson Mbandama had tasked him to find a gun to scare the deceased at the time of receiving salaries. He learnt that A1 approached PW3 on two occasions prior to the shooting of the deceased. After the deceased was shot, A1 approached PW3 requesting him to keep what he had asked him as a secret as other people had executed the plans he had intended to carry out with the firearm.

2.9.3 PW9 further testified that as PW3 was still narrating his version of events, Astra, who was present, received a call from A1 and Astra was made to put his phone on loudspeaker. PW9 then heard A1 tell Astra that he had been told by a workshop foreman at the farm that there were police officers on the farm who had gone to apprehend him. A1 informed

Astra that he wanted to meet with him in the bush to reveal those involved in the killing of the deceased. A1 alleged the farm workshop foreman, Winford Hachibone (A3 in the trial court) was equally involved. PW9 then decided to set a trap to apprehend A1 but he did not show up to meet Astra. When contacted by Astra, he told him that he was aware that Astra was not alone, at which point PW9 suspected that A1 had been tipped off by A3, whom they had met on their way to the farm.

2.9.4 After realizing that A1 was not going to show up, PW9 and his colleagues launched a manhunt for A1. A3 was apprehended first. A1 was not found at his home. PW9 discovered a bottle of J. Black ram similar to the one found at the scene, P6. A folder containing a deposit slip-P5 for the sum of K8,000.00 was also picked from A1's house.

2.9.5 PW9 said as the police officers did not know A1, they looked for a photograph of him in the presence of his wife. In the process of the search they came across a black folder containing A1's documents of notices of approval for payment of unemployment benefits. The first was in the sum of K2,294.36n and the other in the sum of K62,660.00. Investigations from the Zambia Revenue Authority (ZRA) revealed that the document in the sum of K62,660.00 was not genuine. PW9 said further investigations led him to Stanbic Bank Choma branch where he learnt that the deceased had withdrawn money as per P5.

2.9.6 PW9 discovered that A1 had moved to Kalomo. A1 was subsequently apprehended by Zimba police. PW9 stated that he picked A1 from Kalomo where he had been held. While transporting him to Choma A1 received a call from A2. The latter did not reveal his whereabouts. A2 was later apprehended in Kalomo following a tip off from an informer. A2 then led police to PW8's home and the discovery of the firearm-P3.

2.10 In his defence, DW1 Gibson Kafwambi (now A2) narrated that on 10th November, 2018 he was travelling within Kalomo district in a vehicle on his way to an event that he had been hired as a photographer when PW9 and other police officers stopped the vehicle at Kalomo Bridge. He said PW9 apprehended him in connection with the firing of a gun at a funeral. The following day he was informed of the offences relating to the killing of the deceased. He denied any involvement. He further denied knowing PW8 or leading police to his home. He further denied knowing A1 and stated that PW9's testimony was based on lies.

2.11 DW2, Jackson Mbandama (now A1) testified that on 6th March, 2018, whilst attending the deceased's funeral, he and other workers were informed by PW2, their supervisor that the management of the farm would have a meeting on the deceased's burial and discuss the future of the farm. He said he obtained permission from PW2 to collect money in the sum of K3,000.00 owed to him by his previous employer, Silver Land. On 7th March, 2018, he travelled to Zimba and was paid the said

K3,000.00. A further sum of K5,000.00 was paid to him by one Melvin, who had owed him the money. He then deposited K8,000.00 in his Stanbic Bank account held at Choma branch. When he returned to the farm, PW2 informed him that the farm would cease its operations. So he sought further permission to visit his mother in Zimba. On 8th March, 2018, he travelled to Zimba and stayed there for three days. On 11th March, 2018, he ferried his mother to Namadula, some 10 kilometres away to seek the services of a traditional healer, one Mutentwa. He stayed there till 10th April, 2018, then returned to Zimba. He said he was apprehended on 15th April, 2018 from his uncle's home and transferred to Kalomo, then Choma. He denied committing the alleged offences or knowing his co-accused. He further denied fleeing from the deceased's farm. He contended that PW3 lied about the plot to kill the deceased because he was jealous of him and wanted to be a driver. He also said his sister lied in her testimony as he did not get along with her.

3.0 Decision of the court below

3.1 Of the issues not in dispute, the learned trial judge found that: A1 and A2 were employees of Duba 5 Farm at the material time; the deceased died of gunshot wounds on 2nd March, 2018 at the entrance of his farm as confirmed by the postmortem report-P7; a deformed pellet-P4 was extracted from the deceased's body; on the material day employees at Duba 5 farm were scheduled to receive their salaries from the deceased;

and on 7th March, 2018, A1 deposited an amount of K8,000 in his account held at Stanbic Bank Choma branch.

3.2 Of the issues in contention the court below first considered whether or not the deceased had the alleged sum of K149,200.00 on his person on the material day as alleged in the first count. The learned trial judge found the testimony of PW5-bank manager at FNB to the effect that the deceased withdrew the said amount on the day he was shot, was credible as he had no basis to lie to the court. The learned trial judge found that PW5's testimony was corroborated by that of PW2-farm supervisor who told the court that the farm employees were scheduled to be paid on that day.

3.3 On the question of whether or not A1 and A2 took the money from the deceased, the learned trial judge relied, in considering the evidence against A1, on the testimony of PW3 who testified that A1 had approached him on two occasions proposing the killing of the deceased. Considering that PW3 was a suspect witness, the learned trial judge found corroboration in the testimony of PW4 to the effect that A1 was paid a sum of K10,000 cash in her shop by a man unknown to her. Out of this amount A1 gave PW4 a sum of K2000.00 and he remained with K8,000.00. The court below found this testimony credible because A1 confirmed he had deposited K8,000.00 in his bank account as evidenced by a deposit slip-P5. The learned trial judge came to the conclusion that

the money A1 received in PW4's shop was part of the K149,200.00 the deceased had withdrawn from FNB. The lower court was satisfied that A1 had hired the man that gave him the money among others after he had failed to secure PW3's cooperation. The learned trial judge also found A1's conduct elusive after the deceased was killed because he disappeared from Duba 5 farm until he was apprehended. That he failed to challenge PW2's testimony that he did not seek his permission to attend to his ailing mother. Therefore his explanation was an afterthought. The lower court found the circumstantial evidence against A1 compelling that he was involved in the murder of the deceased.

3.4 With respect to A2-Gibson Mufwambi, the court below was satisfied that PW9 saw his name flashing on A1's phone and that PW9 heard A2 inquiring from A1 if he had been apprehended. The learned trial judge was of the view that A2 was worried that it would lead to his own arrest, and that PW9 had no basis to falsely implicate A2.

3.5 In considering whether the appellants were armed with the firearm-P3, the court found that A2 led police to PW8 and the subsequent retrieval of the firearm. That A2 confessed to PW8 the firearm was used in the murder of the deceased and that he (A2) was involved alongside the Susus. On the basis of this testimony the learned trial judge found that A2 was involved and hired by A1.

3.6 Relying on section 21 of the Penal Code *supra* in relation to common intention to the commission of a crime, the lower court found that A1 and A2 played different roles, however, their efforts were directed at the murder of the deceased and of robbing him of his money. The appellants were convicted of both counts and each sentenced to death.

4.0 Grounds of appeal

4.1 Dissatisfied with the verdict of the lower court, the appellants lodged this appeal on the following grounds:

1. **The Court below erred in both law and fact by making a finding that PW4, Lister Mudenda, saw the 1st appellant and a stranger sharing money in March 2018, which finding is not supported by the evidence on record which evidence shows that the incident happened in February 2018.**
2. **The trial Court misdirected itself by finding that PW4, Lister Mudenda, corroborated the evidence of PW3, Mike Chibeye, when PW4's evidence of the 1st appellant sharing money with a stranger happened in February 2018 before the deceased's death.**
3. **The trial Court misdirected itself by accepting PW8's evidence that the 2nd appellant confessed to PW8 that the subject firearm had been used in the commission of the two offences without treating PW8 as a suspect witness whose evidence requires corroboration.**

4. **The Court below erred in both law and fact by convicting the appellants in both counts on circumstantial evidence that was cogent and when an inference of guilt was not the only reasonable inference.**
5. **The Court below erred in both law and fact by convicting the appellants in count one for aggravated robbery when there was no evidence that the deceased had in his possession, at the time of his attack, the money alleged to have been stolen.**

5.0 Appellants' arguments

5.1 The appellant argued all the grounds of appeal together under four headings, the first one being that the learned trial judge made perverse findings of fact and improper use of PW4's evidence. The cases of ***Wilson Masauso Zulu v Avondale Housing Project Limited***[1] and ***Nkhata and Four Others v The Attorney General***[2] were cited to advance the position that an appellate court cannot easily interfere with findings of fact made by the trial court.

5.2 Applying this principle *in casu,* A1 is challenging the trial judge's reliance on the evidence of PW4 to the effect that in March 2018, he visited her at her shop in the company of a stranger, and the latter gave him K10,000.00. His contention is that PW4 categorically admitted in cross-examination that the incident transpired in February, though she could not remember the exact date. That the prosecution had an opportunity to clarify the dates by way of re-examination but they did not do so.

Therefore, it must be taken that the prosecution accepted the date given by PW4, which entails that since the deceased died on 2nd March 2018 and the events narrated by PW4 transpired in February 2018, the said event has no bearing on the issues in this case. Mr. Siatwinda concluded his submission in this regard by submitting that it was a serious misdirection for the trial court to have used this aspect of PW4's evidence to corroborate that of PW3 when the events narrated by the two witnesses transpired at different times.

5.3 Under the second heading, the appellants submitted that the trial judge rightly found that PW3 was an accomplice and thus a suspect witness whose evidence required corroboration before it could be relied upon. That the learned trial judge was therefore right in looking for corroborative evidence. The case of ***William Muzala Chipango & Others v The People***[3] was cited with regards to the need for corroboration of the evidence of a witness who may be an accomplice or have an interest, in order to exclude the danger of false implication. It was held in the said case that:

"Where the prosecution puts a witness forward as one who at the very least has an interest to exculpate himself, the Court cannot decline to treat him as such without some very positive reasons.

Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches

his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded."

5.4 The appellants submitted that the trial court wrongly applied the evidence of PW4 relating to matters that happened in February 2018 before the deceased died as corroboration of the evidence of PW3. Our attention was drawn to the finding of the trial court, which A1 submitted was a wrong finding, that the deposit of K8,000.00 into A1's bank account was an odd coincidence, since it was in the same month that PW4 said she saw it with him at her shop. In dismissing A1's explanation of the source of the K8,000.00 deposited into his bank account on 7th March, 2018, the learned trial judge had the following to say at page J40 of the judgment:

"I am convinced that A2's explanation is an afterthought because it is contradicted by the evidence of two witnesses who are strangers to each other, yet whose versions of their respective but different encounters with A2 within the same time interval are strikingly coinciding despite there being no possibility for them to collude. The two witnesses are PW3 and PW4."

5.5 The appellants reiterated their earlier argument that PW3 and PW4 narrated events that happened in March and February, respectively. It was argued that their version of events cannot therefore coincide. The

appellants contended that the learned trial judge improperly evaluated the evidence and erred in finding that the evidence of PW4 corroborated that of PW3.

5.6 Under the third heading, the appellants' argument is basically that the circumstantial evidence on record was not enough to secure a conviction. The cases of ***David Zulu v The People***[4] and ***Bwanausi v The People***[5] were cited in this regard. In applying this *in casu*, the appellants submitted that for circumstantial evidence to apply, there must firstly be some incriminating basic facts; secondly, those basic facts must be incompatible with the innocence of the accused person; and thirdly, those basic facts must exclude any other inference and point to the guilt of the accused.

5.7 It was argued that as against A1, the trial court found the incriminating basic facts mainly from the evidence of PW3 and PW4, and A1's own conduct of allegedly fleeing from his residence. The argument that the evidence of PW3 and PW4 cannot be relied upon as it is that of a suspect witness and relates to matters that happened before the deceased was killed, was repeated to advance the argument that the evidence of these two witnesses is questionable for purposes of corroboration.

5.8 As regards A1's explanation that he got permission to be away for one month to nurse his sick mother, which the trial court dismissed on the basis that he did not call any witness to support his claim, the appellants

submit that this was a misdirection, as an accused person does not have a burden to prove his explanation. That the trial court should have considered whether the explanation might have reasonably been true. The case of **Chabala v The People**[6] was cited in this regard. It was also argued that the prosecution did not mount any serious challenge to A1's explanation and thus it remains reasonably true. ***Saluwema v The People***[7] was referred to.

5.9 As regards A1's desertion of his usual residence after the deceased's and his avoidance of interrogations, the appellants argued that this in itself could not warrant an inference of guilt without something more to it. Counsel submitted that if indeed A1 had run away, it was possible that he could have done so with a motive that was consistent with his innocence, as a person who is not yet informed that he is a suspect in a matter cannot be faulted if such person decided, for whatever reason, to avoid police interrogations. The case of **Soondo v The People**[8] was called in aid, where it was held that:

> ***"Even if an alibi was a deliberate lie on the part of the appellant, the inference cannot be drawn that he did it because he had been involved in the offence. A man charged with an offence may well seek to exculpate himself on a dishonest basis even though he was not involved in the offence."***

5.10 Turning to A2, Mr. Siatwinda submitted that the incriminating evidence was mainly supplied by PW8. That a perusal of A2's evidence shows that

he did not incriminate himself in his alleged statement to PW8. We were directed to a portion of PW8's testimony, where he told the court that one Sadam Susu got the firearm so that he could go and murder the white man in Choma. Counsel argued that the trial court's finding that A2 confessed to PW8 is not supported by the evidence on record. That in any event, the trial court ought to have treated PW8 as a witness with a possible interest to serve whose evidence required corroboration before it could be relied upon because he had been detained for four (4) days as a suspect in the killing of the deceased and the firearm that was alleged to have been used was linked to him and he admitted it. The case of ***William Muzala Chipango v The People*** *supra* was once again cited.

5.11 In this regard, it was argued that PW8's evidence that he handed the firearm to Sadam Susu has no support from any independent witness, including his wife and his young brother, in whose presence he claimed to have handed over the firearm. That the duo were not interviewed by the police, nor were they called as witnesses to verify this crucial aspect of PW8's evidence. Consequently, PW8's evidence remains suspect and the danger of false implication cannot be said to have been ruled out. That the trial court erred in not treating PW8's evidence with caution. Counsel prayed that the same should be discounted. In *toto*, counsel submitted under this third heading that not only was the circumstantial evidence relied upon by the trial court insufficient to warrant a

conviction, but it was also supplied by suspect witnesses with their own interests to serve.

5.12 Under the fourth heading, the appellants submitted that in proving the offence of aggravated robbery under section 294(2) of the Penal Code *supra*, the prosecution must prove, *inter alia,* that a thing capable of being stolen was indeed stolen; that it was the accused who stole it; and that the accused person used a firearm within the meaning of the **Firearms Act**[2] immediately before, during or after such stealing in order to obtain or retain the thing stolen.

5.13 In advancing their argument that there was insufficient evidence on record connecting the appellants to the two offences, the appellants submitted in relation to the first count that there is insufficient evidence on record that the deceased had in his possession at the time he met his death, the alleged K149,200.00. That the court's judgment shows that guilt was by inference, which can only be the case if it is the only reasonable inference from the evidence, as an examination of the alternatives cannot be dismissed as mere speculation. The case of ***Bwanausi v The People*** *supra* was relied upon in this regard.

5.14 The appellants advanced the argument that there is a possibility that the deceased could have used that money that was possibly meant for salaries for some other transactions before heading home where he was attacked, thus leaving a real possibility that he did not have the money

at the time of his attack. Furthermore, it was submitted that in the absence of evidence of serial numbers for the notes that A1 deposited as compared to the notes that the deceased had withdrawn from the bank, the finding of guilt is far-fetched to warrant an inference that it must have been the same money that belonged to the deceased.

5.15 Secondly, the appellants reiterated their argument about the reasonably possible explanation that A1 gave regarding the source of the money he deposited in his bank account, which explanation was not discredited. The case of **Chabala v The People** *supra* was once again cited to cement the position that A1 had no burden to prove his explanation, which need not even be satisfactory.

6.0 Respondent's arguments

6.1 The state filed written heads of argument on 7th April, 2020. In response to the appellant's submission that PW4 admitted in cross-examination that the incident of A1 receiving K10,000.00 at her shop took place in February 2018, the state submitted that PW4 was enticed by defence counsel into accepting that the incident happened in February 2018. Our attention is drawn to the testimony of PW4 in examination-in-chief and part of cross-examination where PW4 stated that she could not remember the date when she witnessed the A1's monetary transaction with the stranger. However, she later on admitted that it was in February, after defence counsel suggested to her that it was February. In

this regard, the respondent submitted that PW4 was just tired of being asked the same question over and over and she just wanted to get it over with, unfortunately by giving the response that defence counsel was soliciting. On this premise, we were invited to analyse the circumstances under which the witness accepted the inducement that the transaction took place in February.

6.2 Counsel also invited us to note that the coincidence of K8,000=00 deposited by A1 into his Stanbic account on 7th March, 2018 and the sum of money he received in PW4's shop could not be a mere coincidence. It was submitted that this was an odd coincidence which provided corroboration. The case of ***Peter Yotam Haamenda v The People***[9] was cited to the effect that it held, *inter alia* that odd coincidences can prove corroboration; the case of ***Ilunga Kabala and John Masefu v The People***[10] was referred to for its holding that odd coincidences, if unexplained may be supporting evidence; and the case of ***Machipisha Kombe v The People***[11] for its holding that odd coincidences constitute evidence of *something more.*

6.3 It was submitted that if A1's claim was that he received the money in PW4's shop in February, 2018, then he ought to have told the trial court in his defence. However, A1 blatantly denied receiving money from PW4's shop. His testimony was that he received the K8,000.00 he deposited from his previous employer and from someone he had given money to buy cattle. It was submitted that A1 did not allude to receiving any

money in February from PW4's shop. The state contended that the appellants' argument is baseless and ought to be dismissed.

6.4 Under the second heading, the state restated its submissions under the first heading and emphasised that PW4's evidence related to the matter under trial that occurred in March, 2018 and not February, 2018. That PW4 only forgot the date as it is human to do. Counsel submitted that PW4's evidence was sound in relation to the deceased's death in March, 2018.

6.5 It was submitted that even without the evidence of PW4 there was other evidence on record that corroborates the testimony of PW3. Reference was made to the evidence of PW7-the banker from Stanbic Bank, who confirmed that the bank received a deposit from A1 in the sum of K8,000.00 on 7th March, 2018.

6.6 Counsel also referred to the evidence of PW9, the arresting officer, who testified *inter alia* among the documents he found at A1's house was a deposit slip from Stanbic Bank in the sum of K8,000=00 deposited on 7th March, 2018 by A1 himself.

6.7 Further, that A1's conduct of disappearing from Duba 5 farm soon after the deceased's death points to some involvement on his part. The case of ***Felix Muleba and Sharon Muleba v The People***[12] was cited, where the Supreme Court drew an inference of guilt from the fact that the

appellants hurriedly moved from their home shortly after their maid was murdered.

6.8 It was submitted by the state that all the evidence set out above corroborates the evidence of PW3, and that A1 lied about having gotten permission from his supervisor-PW2 to be away from the farm, as this was not confirmed by PW2 when he gave his testimony. Reliance was placed on the case of ***Joseph Mulenga and Albert Joseph Phiri v The People***[13] for the position that failure/omission to confirm incriminating assertions during cross-examination diminishes the efficacy of the arguments that are the basis of the said assertions.

6.9 In response to the third head of the appellants' submissions that the evidence of PW8 lacks corroboration, the respondent referred to the evidence of A2 leading the police to PW8's place, where they hitherto did not know and where the firearm that was used in the commission of the subject crimes was recovered. We were referred to the case of ***Bornface Chanda Chola, Christopher Nyampande and Nelson Sichula v The People***[14] where the Supreme Court held *inter alia* that:

> ***"The leading by an accused of the police to a place they already know and where no real evidence or fresh evidence is recovered cannot be regarded as a reliable and solid foundation on which to draw an inference of guilt"***

6.10 That *in casu* the police were led by A2 to a place they did not know and the firearm that was used in the commission of the offences herein was recovered. Therefore an inference of guilt could be drawn.

6.11 Counsel further referred us to the case of ***Emmanuel Phiri and Others V The People***[15] where it was held that the evidence of an accomplice or a person with a possible interest to exculpate himself needed to be corroborated by at least *something more*. On this basis, the respondent submitted that the danger of false implication was completely excluded by the evidence of A2 leading the police to PW8 where the firearm was found, and this corroborates the evidence of PW8.

6.12 In relation to PW8 possibly having a motive to give false evidence, the state argued that he had no such motive, as it was the A2 who led the police to him, upon which he learned from A2 that the gun he had once given Saddam Susu was used in a crime.

6.13 Turning to the appellants' argument under the fourth heading that the circumstantial evidence was not cogent and guilt is not the only inference that can be drawn, we were once again referred to the evidence of PW8 to the effect that it was A2 who led the police to PW8 and revealed that it was the gun that the latter gave to one Sadam that was used to kill the deceased. In this regard, the learned state advocate submitted that A2 only knew this because he participated in the crimes.

6.14 Another piece of evidence that we are requested to consider as giving cogency to the circumstantial evidence is the evidence of the pellet that was found in the deceased's head being a component of a cartridge of calibre 12.0, which could be loaded from the gun that was recovered through PW8. Counsel argued in this regard that this cannot be a mere coincidence as it corroborates A2's revelation to PW8 considering that it is a rural setting where not very many people own guns of that nature. We are again directed to the evidence of PW3 as corroborating that of PW4 in the following respect:

a) A1 disclosed to PW3 his plan to kill the deceased on payday. Coincidentally, the deceased was murdered on payday as confirmed by PW2;

b) A firearm was used in tandem with the evidence of PW3, who was told by A1 to look for a gun;

c) PW8 gave the gun to Sadam Susu on 1st March, 2018, the deceased was murdered on 2nd March, 2018 and the gun was only returned to PW8 after 3 days;

d) A1 told PW3 that he was expecting money and he suddenly deposited K8,000 into his bank account yet his salary was less than K1,000;

e) The similarity of alcohol bottles found at the scene where the deceased's body was found to those found at A1's doorstep is no mere coincidence;

f) A1 went to PW3's house shivering saying he was afraid upon seeing the deceased's blood, and cautioned him not to tell anyone about his previous felonious proposals; and

g) The overall conduct of A1 having disappeared from the farm after the deceased was murdered is incompatible with innocence, excludes other inferences and only allows an inference of guilt.

6.15 The state submitted that the circumstantial evidence *in casu* is more than sufficient to render only an inference of guilt.

6.16 Responding to the appellants' submission under the fifth ground of appeal that there was no evidence that the deceased had in his possession the money alleged to have been stolen at the time he met his death, the state referred to the evidence on record narrowing down the time between when the deceased withdrew the subject money from the bank and when his corpse was discovered to about 2 hours. It was submitted that the deceased had the money with him when he was murdered, which is why he was murdered. That the accused persons were after the money the deceased had withdrawn for salaries, given that his vehicle was not stolen. On this basis, counsel submitted that the state had proved that the deceased was robbed of K149,200.00 which he went to withdraw that morning, and that it was the appellants herein who robbed him whilst acting together and armed with a firearm. We are

urged to uphold the lower court's findings and to dismiss the appeal in its entirety.

7.0 The decision of the court on appeal

7.1 We have considered the appeal before us, the judgment of the lower court, the evidence on record, as well as authorities and submissions by learned counsel for both parties. We shall now proceed to address the respective grounds of appeal.

7.2 In summary, a reading of the evidence on record reveals that the chain of circumstantial evidence implicating A1 is as follows; PW3 testified that A1 had been enticing him to connive with him to kill the deceased and rob him of money meant to pay salaries. A1 asked PW3 to find a gun. But PW3 allegedly did not heed to this proposal. It is not in dispute that A1 was an employee of the deceased and as such, he knew when the deceased usually paid his employees.

7.3 On the day that salaries were due, the deceased withdrew K149,200.00 from the bank and was murdered on his way back to the farm. The K149,200.00 was never recovered. A little while after the deceased was killed, A1 allegedly told PW3 that he was expecting to be paid some money by his previous employers. He allegedly forged papers purporting to show that he was entitled to a payment of about K62,000.00 from Zambia Revenue Authority. He was later seen by PW4 receiving K10,000.00 from an unknown man, out of which he gave PW4

K2,000.00. On 7th March, 2018 A1 deposited K8,000.00 into his bank account.

7.4 Based on these circumstances, the learned trial judge concluded that the K10,000.00 A1 received was his share of the money that the deceased was robbed of when he was murdered, and consequently that he took part in the murder of the deceased. There is also evidence of A1's subsequent elusive conduct after he became aware that the police were looking for him.

7.5 The question that now begs our answer as we seek to establish whether or not it was safe to convict A1 on this evidence that is purely circumstantial is whether or not the said circumstantial evidence is so cogent as to leave only an inference of guilt, as guided by a plethora of authorities on this subject, *inter alia* ***David Zulu v The People*** *supra*, which sets out circumstances in which a court may convict on circumstantial evidence.

7.6 We note the appellants' submission that the trial judge assumed that the transaction narrated by PW4 took place in March. There is indeed no evidence on record to this effect, as PW4 appeared to have forgotten when exactly the incident she narrated transpired, and the learned trial judge had no basis to conclude that it had taken place in March, when in fact what she admitted to in cross-examination after defense counsel suggested that it, was that it occurred in February. On this aspect, we

are guided by the case of ***Phiri and Others v The People***[16] where it was stated that:

> ***"The courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction, the courts have no alternative but to acquit the accused."***

7.7 We shall now consider what relevance/weight the learned trial judge attached to the piece of evidence in issue. To start with, the learned trial judge found that it was an odd coincidence that although A1 denied ever meeting with PW4, there is evidence on record that shortly after PW4 saw A1 receiving money at her shop, he subsequently deposited K8,000.00 into his Stanbic Bank account on 7th March 2018 as evidenced by a receipt to this effect.

7.8 Our considered view on this issue is that even if we were to discount this aspect of the evidence so far as it relates to the month of March, the remainder of the evidence still points to him as the offender. In this vein, we refer to our earlier decision in ***Ezious Munkombwe and Others v The People***[17] where we stated that;

> ***"...when considering a case anchored on circumstantial evidence, the strands of evidence making up the case***

against the appellants must be looked at in their totality and not individually."

7.9 The appellants submitted in negating the trial court's reliance of PW3's evidence, that he was a suspect witness whose evidence required to be corroborated, as he may have implicated A1 in order to exonerate himself. In this regard, the court below had the following to say at page J40 of the judgment appealed against:

> ***"Given the contemporaneity of the events, I am of the view that the transaction which PW4 witnessed in her shop corroborates A2's indications to PW3 that he would soon be paid some money by his former employers. Having found that A2 attempted to lie about the true source of the money he was paid by the stranger, I find this to be corroboration of PW3's evidence that A2 had proposed that the duo should kill and rob the deceased. I have no doubt therefore that the payment which A2 told PW3 would come from his previous employers, is the money which he was paid by the stranger in PW4's shop."***

7.10 The learned trial judge then found that the evidence of PW3 and PW4 corroborated each other in dispelling A1's contention about the source of the K8,000.00 that he deposited in his bank account, which was in fact paid to him by a stranger at PW4's shop. The trial judge came to the

conclusion that the K10,000.00 was part of the money that was taken from the deceased after he was murdered, and it was paid to A1 as his share in coordinating the murder. This was on account that he knew when the deceased usually collected money to pay his employees' salaries as he was also one of the employees.

7.11 Considering the strands of circumstantial evidence implicating A1 as we have summarized it above as a whole and not individually, we are of the view that the circumstantial evidence indeed points to the guilt of A1 and leaves no other inference than that of guilt. We agree with the trial court's finding that the evidence of PW3 and PW4 corroborate each other, given that the two witnesses had no motive to collude against A1. The first ground of appeal effectively fails as against A1.

7.12 With respect to ground two, as we considered the cogency of circumstantial evidence implicating A1 under the first ground, we pointed out that the pieces of evidence should be considered collectively as opposed to individually, as such is the nature of circumstantial evidence. We have earlier in this judgment agreed with the appellants' submission that there is no evidential basis upon which the trial judge concluded that the incident narrated by PW4 took place in March 2018.

7.13 In the same vein, we would like to address the respondent's submission that A1's disappearance from the farm and his alleged lying about having gotten permission to be away points to his involvement in the murder. In

the case of ***Saluwema v The People*** *supra* the then Court of Appeal held as follows:

> ***"The fact that the appellant himself gave lying evidence as to his actions could not conclude the case against him. Such a fact is material when assessing the weight which is to be given to evidence against an accused which appears to be credible and probable in itself, and it may add such weight to such evidence as renders it conclusive against the accused."***

7.14 In the context of this holding, we wish to restate that the evidence relating to A1 telling lies about his whereabouts does not in itself point to his guilt. Even in the case of ***Felix Muleba and Sharon Muleba v The People*** *supra* cited by the respondent, the hurried movement of the appellants from their house was not the only basis upon which the Supreme Court confirmed their guilt. This evidence was tied to other strands of circumstantial evidence in the absence of direct evidence.

7.15 *In casu*, when analysed in the context of all the other evidence implicating A1, we have shown above that an inference of guilt is an inescapable conclusion. We find no merit in this ground of appeal.

7.16 Turning to the third ground of appeal, we will turn towards the evidence incriminating A2. We have demonstrated earlier how we arrived at the conclusion that the cogency of the circumstantial evidence against A1 is

so substantial as to lead only to an inference of guilt. We have noted that some of the arguments advanced on behalf of A1 under this ground are in fact repetitive.

7.17 The main issue, in our view, is how the lower court treated the evidence of PW8 as against A2 - that it ought to have been corroborated. The respondent submitted in this regard that PW9's evidence of A2 leading PW9 to PW8 to recover the gun is corroboration of PW8's evidence. The most significant aspect of PW8's evidence in so far as it implicates A2 is the alleged confession to PW8 by A2 that the gun recovered from PW8 was the one A1 and others used to murder the deceased. A reading of the proceedings in the lower court shows that PW8 testified that A2 told him that when Sadam Susu got the gun from PW8, he did not have a buyer; that he got the gun for another purpose and that was to kill the deceased. That Sadam also told A2 that he had obtained the gun from PW8. In this regard, the trial judge stated at page J45 as follows:

"I am satisfied that A1 confessed to PW8 that the subject firearm had been used in the commission of the two offences and that A1 was one of the murderers...

A1 confessed to PW8 that he is an accomplice alongside the Susus in the commission of the present offences...

I am satisfied that A1 was involved in the commission of the subject offences and was hired to do so by A2."

7.18 The record shows that the conversation between PW8 and A2 relating to the subject gun took place while they were in a police vehicle on their way to collect the subject gun from PW8's father-in-law, in the presence of PW9 and other police officers. It is therefore surprising that PW9 in his testimony did not make mention of the alleged confession. In any event, the evidence of PW8 is to the effect that A2 told him that Sadam intended to use the gun to murder the deceased, not that A2 murdered the deceased with the subject gun, nor that he participated in the commission of the said offence. This further weakens the evidence of PW8, especially that he is already a witness whose evidence requires corroboration.

7.19 We note that at the hearing of this appeal, Mrs. Kachaka in response to Mr. Siatwinda's oral submission that A2 did not incriminate himself referred to evidence in the record of appeal where PW8 said A2 told him, "This is the gun we used to murder a white man." We also note that PW8 said this in cross-examination, contrary to his earlier testimony that PW8 only told him that Sadam Susu intended to use the gun to murder the deceased, as opposed to finding a prospective buyer.

7.20 We will now consider the evidence purporting to corroborate PW8's evidence of A2's alleged confession, and that is the evidence that A2 led PW9 and others to PW8, which led to the recovery of the subject firearm. PW9 testified that A2 knew PW8 and led the police to him.

7.21 Our considered view is that it is not in dispute that A2 and Sadam Susu, who obtained the gun from PW8, knew each other. What is in dispute is whether A2 admitted to PW8 that he was involved in the murder of the deceased. The evidence of PW9 who was in the same vehicle with A2 and PW8 at the time A2 allegedly confessed his involvement in the murder does not allude to this. PW9 informed the trial court that an informer informed him that the gun alleged to have been used to kill Clive Wixley was gotten in Kalomo from PW8. PW9 told the court that PW8's brother was picked from PW8's shop, and he led police to PW8's farm. PW8's evidence of A2's involvement is not corroborated by any other evidence on record. It was therefore a misdirection on the part of the trial judge to have concluded that A2 confessed his involvement and he was hired by A1, when there is no evidential basis for this finding. We therefore set aside the said finding and allow this ground of appeal in favour of A2.

7.22 With regards to ground four, we reiterate that this case is anchored mainly on circumstantial evidence. We have earlier laboured to elaborate how different pieces of incriminating evidence, when pieced together, point to the guilt of A1. The respondent has properly made submissions on the time factor between when the money was withdrawn from the bank and when the deceased's body was found, coupled with the fact that salaries were due on that day. Withdrawal of money from the bank is not the only basis upon which the trial judge convicted the appellants. There is other incriminating evidence on record which we have alluded to

earlier in supporting the conviction as against A1 in both counts. Needless to repeat our earlier position, we find that the fourth and fifth grounds of appeal only succeed as against A2.

8.0 conclusion

8.1 For the foregoing reasons we hereby disallow this appeal in relation to A1-Jackson Mbandama and uphold the lower court's conviction and sentence.

8.2 As regards A2-Gibson Siakabbula Mufwambi, we allow the appeal, quash his conviction and set him at liberty forthwith.

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F. M. Chisanga
JUDGE PRESIDENT

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE

.....

P.C.M. Ngulube
COURT OF APPEAL JUDGE