

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

FRANCIS MWEEMBA

AND

THE PEOPLE

APPELLANT

RESPONDENT

CORAM: CHISANGA JP, KONDOLO SC, MAJULA, JJA

On ^{25th} April, 2019 and on qS j4t^W, 2020

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

*For the Respondent : Mrs. G. Mulenga, Senior State Advocate- National
Prosecution Authority*

JUDGMENT

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

- 1. David Zulu v The People (1977) ZR 151**
- 2. Yotamu Haamenda v The People (1977) ZR 184 (SC)**
- 3. Muvuma Kambanja Situna v The People (19820 ZR 115 (SC)**
- 4. Joe Banda v The People – SCZ Appeal No. 183 /20 13**
- 5. Elias Kunda v The People (1980) ZR 100**
- 6. James Mwango Phiri v The People SCZ/171/2018**
- 7. Sakala v The People (1980) ZR 205**
- 8. Donald Fumbelo v The People SCZ Appeal No.476/2013**

LEGISLATION REFERRED TO:**1. The Penal Code, Chapter 87, Laws of Zambia**

The Appellant has appealed against conviction on two counts of Murder contrary to Section 200 of the Penal Code and one count of aggravated robbery contrary to Section 294 (1) of the Penal Code Chapter 87 of the Laws of Zambia. The Appellant was initially charged with two others who were found with no case to answer and acquitted after the prosecution closed its case and were accordingly set at liberty.

The evidence of PW1 to PW4 who worked as game scouts at a private game ranch called Langani Game Ranch (LGR) was that on the morning of 21st December, 2016, gunshots were heard and they were deployed to go and investigate. At a certain point within the Ranch they found fresh blood of an animal with boot marks leading away from the area. They followed the boot marks which led them outside the ranch and as they followed the tracks they heard a sudden barrage of gun fire from suspected poachers and took cover. The rangers responded by firing in the air to give the

poachers a chance to leave the area but the poachers also fired in the air.

The rangers decided to run back to the camp in a single file but discovered that one of their number Samson Mupango (the 1st deceased) was missing and another Felix Lungo (the 2nd deceased) had been shot and injured. They lifted Felix Lungo and took him back to the Ranch but he later died.

PW5 was Francis Mwelwa who testified that on 22nd December, 2016, his mother who resided in Katuba, phoned and told him that somebody was selling game meat. He travelled to Katuba where he bought a warthog carcass from the Appellant at ZK800.

Esther Koni Mwalwisha, PW6, told the Court that she lived with her cousin Peter Lusuko (PW9) and his friend Francis Mweemba (the Appellant) and that on the evening of 23rd December, 2016, the police stormed their house and they had two people in their custody. They had come to apprehend PW9 and the Appellant who were placed in handcuffs and the Appellant led the police to an anthill behind the house where three (3) firearms were retrieved.

PW9, Peter Lusuko testified that one of the firearm's recovered at the anthill was his. He recalled that on 21st December 2016 his

cousin Michael Tembo, borrowed the gun and when he returned it in the evening, he was in the company of three other people he did not know and they had a carcass in their possession. He told the Court that he later witnessed Michael Tembo selling the carcass to a buyer from Lusaka and that Michael, who was on the run had hidden the gun in an anthill

PW 11 was the arresting officer Detective Chief Inspector Kabwe informed the Court that he visited the scene of crime where he recovered an empty cartridge and he also established that a pump action shotgun, serial no. 626609 was stolen from the scene after the ^{1st} Deceased was shot and killed. After following a lead, the police apprehended the Appellant and the stolen pump action shotgun was recovered from where it was hidden in an anthill near his house.

He further stated that the carcass, which turned out to be warthog, sold to Francis Mwelwa (PW5) by the Appellant was recovered from PW5. PW1 1 explained that PW9 was arrested for failing to secure a firearm.

The Appellant was put on his defence and he gave sworn evidence and called no witnesses. He stated he was a businessman

who amongst other things, traded in wild animals. He bought a warthog carcass from Joseph Sakala and Boyd Shaibila at K1,000 and resold it to PW5 on 21st December, 2016 around 07:00hrs for K800.

The Appellant explained that whilst at home with his landlord, the Police came and conducted a search without telling him what they were looking for and he was bundled into a police vehicle and taken to Chisamba Police Station. He said the Police wondered what he was doing with PW9 and he wasn't aware that PW9 kept a gun. He expressed ignorance regarding the firearms recovered by the Police.

The trial Court accepted the evidence of PW1 to PW4 and found that the only reasonable inference was that the shots heard by the witness occasioned the death of the two deceased. Nobody saw the shooter meaning that the evidence is circumstantial. Two days later, the Appellant was found with the ^{1st} deceased's firearm which was stolen on the fateful day.

The learned trial Judge stated the fact that the Appellant was found in possession of the gun within two days of the deceased being killed and his failing to offer an explanation as to how it came

into his possession plus the fact that an animal carcass was also in his possession during the same period, was an odd coincidence.

The lower Court found that the only inference to be drawn from the evidence was that the Appellant killed the deceased personally or was in the company of the person who did, in which case he would still be liable under the doctrine of common purpose. The Appellant was convicted on all three counts,

The Appellant has appealed against conviction on all three counts and he filed four (4) grounds of Appeal as follows;

1. The Court below erred by convicting the Appellant on circumstantial evidence which is very weak, lacks cogency and does not permit an inference of guilt as the only reasonable inference that can be drawn from the evidence.

2. The Court below misdirected itself in both law and fact by finding that the Appellant led to the recovery of P1, the Pump Action Short Gun Serial No. 626609 owned by Langani Game Ranch, when there is no evidence on record to support such a finding.

3. **The trial Court fell in error by finding that the Appellant's possession of the carcass of the Warthog was an odd coincidence when there is no evidence on record that the said Warthog was poached and/or killed from Langani Game Ranch on the material day or at all.**
4. **The lower Court erred in law and fact by dismissing the Appellant's explanation on how he came into possession of the carcass of the Warthog without giving any reasons for doing so and without considering whether the explanation could reasonably be true.**

The Appellant filed heads of argument in which the four (4) grounds of appeal were argued as one. The gravamen of the Appellant's argument was that quite contrary to the principles set out in the case of **David Zulu v The People** ⁽¹⁾ the trial Court convicted the Appellant on the basis of circumstantial evidence which was neither credible nor cogent and from which several inferences could be drawn. Counsel for the Appellant submitted that the circumstantial evidence upon which the trial Judge

convicted the Appellant is found at page 119 of the Record of Appeal where he said the following;

"... the accused was two days after the murder of the two game scouts found in possession of the Pump Action firearm serial no. 6266609, the same firearm that the late Samson Mupango held on the fateful day during the pursuit of the poachers that were poaching In LGR. Secondly, the day after the incident, the carcass of the animal reasonably suspected to have been poached from LGR was found in possession of the accused,"

It was argued the trial Judge had misapprehended the facts because there was no evidence that the Appellant was found in possession of the pump action firearm nor that he led to its recovery. He pointed out that when PW 11, the arresting Officer testified, he made no mention at all of the Appellant being found in possession of the pump action firearm nor leading the police to recovering it but that as shown on page 82 of the Record of Appeal, the Appellant led to the recovery of another home-made gun.

Counsel acknowledged that PW6, Esther Mwalibisha testified that the Appellant led the police to the recovery of the guns but pointed out that she did not describe the guns nor identify the pump action firearm in Court. He submitted that PW6's evidence was impeached during cross-examination and therefore of no value because it was contradictory. He argued that PW9 told the Police that he hid a gun at the ant-hill. It was on that basis submitted that there was no evidence linking the Appellant to the pump action firearm serial no. 6266609.

It was further submitted that PW9 told the trial Court that the gun was hidden by one Michael Tembo but the Police did not investigate that lead at all. Counsel alleged dereliction of duty and in terms of the holding in *Peter Yotamu Haamenda v The People* ⁽²⁾ such dereliction must operate in favour of the Appellant because there was nothing on the record to offset the prejudice.

With regard to the warthog carcass, it was submitted that there was no evidence that the said warthog belonged to and was poached from LGR. Further, that the Appellant explained he purchased the warthog from two men, Joseph Sinkala and Boyd Sambela on ^{18th} December, 2016 and he later sold it to PW5

Francis Mwelwa. It was submitted that the trial Court did not explain why it dismissed the Appellant's explanation and the case of **Muvuma Kambanja Situna v The People**⁽³⁾ was cited.

The argument was advanced that the only opportunity the Appellant had to give his version of events was when he was put on his defence and the case of **Joe Banda v The People**⁽⁴⁾ was called to aid. It was also submitted that the Appellant's explanation could reasonably be true and the Court should have given due consideration to that fact on the basis of **Elias Kunda v The People**⁽⁵⁾ in which the Court said;

"There cannot be a conviction If an explanation given by the accused, either at an early stage (such as to the police) or during the trial, might reasonably be true."

The Appellant summed up by arguing that an inference of guilt was not the only inference that could be made from the circumstantial evidence presented to the Court and as such the Appellant should be acquitted.

The Respondent's reaction was essentially an argument that the circumstantial evidence led by the State was robust and the trial

Judge was correct in finding that it only permitted an inference of guilt. According to the Prosecution, the evidence on record showed that the pump action shotgun stolen from the Deceased, Samson Mupangu, after he and Felix Lungu were murdered was recovered from an anthill behind the Appellant's house two days later. Further that PW6 explained how the Appellant led the police to the anthill where a number of firearms including the subject gun were found.

The State added that the forensic evidence showed that the six pellets retrieved from Samson's body were the same calibre as the empty cartridges picked from the crime scene and also of the same calibre as live cartridges recovered from the Appellant's yard at the anthill.

Further still, the Record showed that the game scouts, including the Deceased, reacted to gunshots and they found that an animal had been killed by poachers and were shortly thereafter fired upon by unknown gunmen resulting in the deaths of Samson and Felix. A day after the murders, the Appellant sold PW5 a warthog carcass and his account of how it came into his possession was raised for the first time during his defence thus prompting the Prosecution

to brand it as an afterthought, in line with the holding in the case of **James Mwango Phiri v The people**⁽⁶⁾. It was opined that the only inference from these facts was an inference of guilt.

At the hearing, the parties advanced the same arguments save a submission by the State conceding that the charge of aggravated robbery had not been proved. The defence were elated by the concession and gladly accepted. The *viva voce* submissions by both parties with regard to the conviction on the two counts of murder were substantially the same as those advanced in the written submissions.

We have considered the Record of Appeal and the submissions of both Counsel for the Appellant and the Prosecution and are in agreement that this case involves circumstantial evidence. The law in this regard is well understood by both Parties who cited relevant authorities as to what constitutes circumstantial evidence and how such evidence can lead to an accused person being convicted.

The prosecution did not support the conviction on Count 3 and rightly so, as the evidence did not prove the charge on this Court. The Appeal therefore succeeds on ground 4 and the Appellant is therefore acquitted of the charge of aggravated robbery.

We now turn to Count 1 and Count 2. The leading and probably most cited authority on circumstantial evidence is the case of *David Zulu v The People* (supra) in which the Supreme Court set out the parameters of circumstantial evidence as follows;

(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.

(ii) It is incumbent on a trial judge that he should guard against drawing; wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

(iii) The appellant's explanation was a logical one and was not rebutted, and it was therefore an

unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.

Further, in the case of **Sakala v The People** ⁽⁷⁾ it was held that to safely convict on circumstantial evidence, the evidence must be so cogent and compelling that no rational hypothesis other than murder could be ascertained from the facts.

The trial Judge convicted the Appellant on the basis of two findings of fact, namely;

1. The Appellant led the police to the recovery of the pump action shotgun barely 48 hours from the time the holder of the gun, Samson Mupango was killed at LGR and he gave no satisfactory explanation as to how it came into his possession.
2. The carcass of an animal reasonably suspected to have been poached from LGR was found in the possession of the Appellant the day after the incident.

The trial Judge stated that, "**Possession of the said firearm and the carcass of a warthog considerably at the same time Is an odd coincidence**" and proceeded to conclude that the only

reasonable inference to be deduced from the evidence herein is one of guilt.

The Defence have challenged the finding of fact that the pump action shotgun was found in the possession of the Appellant or that he led the police to its recovery. We have stated time and again that appellate Courts will only interfere with a trial court's finding of facts in the most compelling of circumstances and within very strict parameters. See the case of *The Attorney-General v Marcus Kampumba Achiume*.

The Defence also raised the issue that PW6 on whose evidence the trial Judge had relied, under cross examination accepted that her written statement to the Police did not say that it was the Appellant who led the police to the hill where the firearms were recovered.

We agree with the Appellant's argument that PW 11 the arresting officer did not state that the Appellant led them to the recovery of the guns. PW1 1 said that a total of five guns were found hidden in an anthill after the Police searched the area around the Appellants house. The gun stolen from the deceased game ranger Samson Mpango, was amongst the guns found.

PW6 testified that the Appellant led the police to where the guns were hidden. In our view the probative value of PW6's evidence is that the anthill where the guns were recovered is near the Appellant's house and as the Record will reflect, she said the anthill was behind the house. The arresting Officer testified that the anthill was about 50 meters away from the house. The Appellant argued that he was not aware that any firearms were recovered from anywhere near his home. The lower Court believed PW6 and PW1 1 and we accept that the guns were recovered in an anthill behind the Appellants house.

The Appellant further testified that he bought the warthog carcass from two men but the trial Judge rejected the evidence and at page J8 (page 120 of the Record of Appeal) said as follows;

"The explanation given by the accused regarding how he came into possession of the carcass is unsatisfactory to exonerate him from criminal liability. In Fact, the motive of his incredible defence was to mislead the Court in an attempt to escape justice albeit unsuccessful."

Despite the authorities cited by Counsel for the Appellant on this point, we have no reason to upset the trial Judge's finding in this regard. The Record shows that the arresting Officer was not cross-examined on the Appellant's assertion that he was sold the warthog carcass by Joseph Sakala and Boyd Shambela. The Appellant's explanation in this regard was clearly a mere afterthought.

We also note from the Record that the Appellant stated that he bought the warthog carcass at K1,000 and later sold it for K800, a transaction to us, which makes no sense at all and only reinforces our view that his evidence on this issue was an afterthought. We refer to the case of **Donald Fumbelo v The People** ⁽⁸⁾ in which it was held that where an accused person does not contradict Prosecution witnesses during cross examination he is likely to be disbelieved when he brings up his own version of the story for the first time during his defence. We have no reason to interfere with the trial Judge's finding that the Appellant sold the warthog carcass to PW5.

The facts show as follows;

1. LGR was attacked on the ^{21st} December, 2016 by suspected poachers resulting in the death of two rangers, namely Samson Mupango and Felix Lungo and the gun held by Samson Mupango was stolen from the scene by the suspected poachers.
2. There was evidence that an animal had been poached and taken away.
3. The Appellant sold a warthog carcass to PW5 Francis Mwelwa, the following day, 22d December, 2016.
4. On ^{23rd} December, 2016, two days after the attack on the ranch, the firearm stolen from the deceased Samson Mupango was recovered together with other firearms from an anthill behind the Appellants house.

We agree with the trial Judge that the circumstantial evidence set out against the Appellant points only to an inference of guilt and the lower Court was therefore on firm ground when it applied the principles of common purpose provided by **section 22 of the Penal code** and convicted the Appellant for Murder on Count 1 and Count 2 on the basis of the circumstantial evidence.

As earlier stated, this Appeal succeeds on count 3 but is dismissed on counts 1 and 2 and the convictions and the sentences meted out for murder are therefore upheld. The Appeal is dismissed.



F.M. CHISANGA
JUDGE-PRESIDENT

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M.M. KONDOLO, Sc
COURT OF APPEAL J

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