

**IN THE COURT OF APPEAL OF ZAMBIA    CAZ APPEAL NO. 30,31,32,33/2021**  
**HOLDEN AT NDOLA**  
(Criminal Jurisdiction)

BETWEEN:

**BORNFACE NDUMBA**

**1<sup>ST</sup> APPELLANT**

**EDWARD NKHATA**

**2<sup>ND</sup> APPELLANT**

**KACHECHE MAFWANDA**

**3<sup>RD</sup> APPELLANT**

**SHIPILIFYE SILVESTER**

**4<sup>TH</sup> APPELLANT**

AND

**THE PEOPLE**

**RESPONDENT**



**CORAM: MCHENGA DJP, KONDOLO SC, BANDA-BOBO JJA**

**On 17<sup>th</sup> November, 2021 and on 9<sup>th</sup> December, 2022.**

*For the Appellants    : Mrs. M. Makai , Legal Aid Counsel- Legal Aid Board*

*For the Respondents : Mr. S. Simwaka, Senior State Advocate – National  
Prosecution Authority*

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## **J U D G M E N T**

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**KONDOLO SC JA** delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Wilson Mwenya v the People (1990-1992) ZR 24**
- 2. Andrew Mwenya v the People SZC Appeal No. 0640/2013**
- 3. Kuyewa v The People (1996) SJ No. 2 of 1996**
- 4. Ives Mukonde v The People SCZ Judgment No. 11 of 2011**
- 5. Nalisa Sikota v the People Appeal No. 5/2019**
- 6. Webster Kayi Lambwe v The People (1986) Z.R. 93**
- 7. Kaumba Sitenge v The People CAZ 224/2020**

LEGISLATION REFERRED TO:

1. **The Penal Code, Chapter 87, Laws of Zambia**

## **1. INTRODUCTION**

- 1.1. The Appellants were charged and convicted of the offence of murder contrary to **section 200 of the Penal Code**, by the High Court in a judgement delivered by Justice Mr. C. Chanda on 21<sup>st</sup> August 2020.
- 1.2. The Appellants were alleged to have murdered Rodwell Chansa in Solwezi on an unknown date but between 20<sup>th</sup> and 21<sup>st</sup> December, 2019.

## **2. BACKGROUND**

- 2.1. PW1 (Febby Jikoma) told the Court that on 20<sup>th</sup> December, 2019, she went to collect some money from her boyfriend, Edward Nkhata, the 2<sup>nd</sup> Appellant (A2), at his bar. When she got there, the deceased started “proposing love” to her at the entrance of the bar and as would be expected, A2 was incensed by this behaviour and a fight broke out. The 3<sup>rd</sup> and 4<sup>th</sup> Appellants then joined the fight against the deceased. The deceased received fists and kicks from the trio. Michael Kinyenge (PW2) tried to stop the fight but to no avail. According to PW1, when the 1<sup>st</sup> Appellant joined the fight, he

hit the deceased with a stick on the head and the deceased became weak.

- 2.2. Eventually the deceased became powerless and when the 4<sup>th</sup> Appellant noticed this, he ran away. The 2<sup>nd</sup> Appellant requested her to keep an eye on the bar while he, the 1<sup>st</sup> and 3<sup>rd</sup> Appellant lifted the deceased and took him away.
- 2.3. She concluded her evidence in chief by stating that she knew all the Appellants well as they lived in the same community.
- 2.4. Another witness who witnessed a portion of the crime being committed was PW2. He stated that he witnessed the 2<sup>nd</sup> Appellant slapping the deceased and saw the other three Appellants approach the altercation but he didn't see any of them strike the deceased. He tried to stop the fight between the 2<sup>nd</sup> Appellant and the deceased and urged the 2<sup>nd</sup> Appellant to forgo everything given the fact that the deceased was drunk. However, as he was in the process of separating them, the other Appellants drew near the fighting duo.
- 2.5. According to PW2, he managed to calm the situation but the Appellants told him that if the deceased stayed at that place, they would beat him. PW2 left the bar.



- 2.6. The following day, he woke up to the news of the deceased's death. Lastly, he stated that he had known the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants for about 5 years while he only knew the 2<sup>nd</sup> Appellant for about 6 months.
- 2.7. PW3 and PW4 confirmed that the deceased was found the following morning near Bonny's shop (1<sup>st</sup> Appellant) and was taken to the hospital where he died. PW5 was the police officer who attended the Postmortem while PW6, Constable Banda Levison was instructed by Inspector Chilufya to detain the 2<sup>nd</sup> Appellant.
- 2.8. PW8 was Detective Sergeant Charles Chifinsa the Investigating officer who informed the Court that the deceased's relatives on 25<sup>th</sup> March, 2020 reported a case of murder which occurred between 20<sup>th</sup> and 21<sup>st</sup> December, 2019. He was assigned to the case and was handed the docket that same day.
- 2.9. PW6 explained how he investigated the case and apprehended the 4 Appellants. He apprehended the 3<sup>rd</sup> and 4<sup>th</sup> Appellants at a bar in Kabitaka area. PW8 then went to the 2<sup>nd</sup> Appellant's house but found that the 2<sup>nd</sup> Appellant had gone to Kitwe. On 27<sup>th</sup> March, 2020, the 2<sup>nd</sup> Appellant



was taken to the police station by his mother. 9 days later, the 1<sup>st</sup> Appellant was apprehended by PW7 (Kennedy Kinyenge) with the help of other members of the community at Kimali area.

2.10. In their defence, all the Appellants denied any involvement with the deceased or his death. The 1<sup>st</sup> Appellant completely denied having been anywhere near Eddies bar that night and even denied knowing Eddie (the 2<sup>nd</sup> Appellant).

2.11. The 2<sup>nd</sup> Appellant denied having fought with the deceased that night stating that he did not see the deceased. He further denied knowing PW1 and PW2.

2.12. The 3<sup>rd</sup> and 4<sup>th</sup> Appellants equally denied being at the bar that night and denied knowing PW1 and PW2.

### **3. HIGH COURT DECISION**

3.1. The trial Judge analysed the evidence of the Appellants starting with that of the 1<sup>st</sup> Appellant. He found as follows:

- i) The 1<sup>st</sup> Appellant ran away after committing the offence and this would explain why he did not see or hear anything happening right at his shop which was a few meters from his house.

- ii) The 1<sup>st</sup> Appellant knew details about the 2<sup>nd</sup> Appellant's mother as she used to buy groceries from his shop and she had a bar near his shop. The Judge rejected the claims by the 1<sup>st</sup> Appellant that despite knowing about the 2<sup>nd</sup> Appellant's mother, he did not know the 2<sup>nd</sup> Appellant.
- iii) The Court refused to accept the assertion that the 1<sup>st</sup> Appellant and PW7 only met when the apprehension was taking place and was more inclined to agree with the prosecution witness that the 1<sup>st</sup> Appellant run away from Kabitaka and was hiding away in Kimale area.
- iv) The trial Court rejected the evidence adduced by the 1<sup>st</sup> Appellant as an afterthought.
- v) Further, the Court did not find any evidence to show that PW1 and PW2 were in any way implicated in the murder and thus had no need to exonerate themselves.

3.2. With regard to the 2<sup>nd</sup> Appellant, we noted the following:

- i) The 2<sup>nd</sup> Appellant denied knowing PW1 and PW2 but later conceded to knowing PW2. The trial Judge found the evidence of PW1 and PW2 to be consistent and their demeanors, as they testified,



did not present any signs that they were concocting their stories.

- ii) The 2<sup>nd</sup> Appellant was not being truthful when he stated that he continued going to the bar and never left to go anywhere and yet his father confirmed that he was in Kitwe and he was only taken to the police by his mother two days later.

3.3. The Court's analysis of the 3<sup>rd</sup> Appellant's evidence rested on his alibi which was rejected on the basis that he did not furnish the police with any details of his whereabouts such as his employer or place of work.

3.4. Similarly, the 4<sup>th</sup> Appellant's alibi was rejected on the basis that he too did not give the police any names or addresses of people to speak about his whereabouts on the day in question.

3.5. On the totality of the Appellants' evidence, the trial Judge found that the Appellants merely offered bare denials to the allegations against them and proffered no concrete evidence in support of any defence as required.

3.6. The learned trial Judge went on to find that the Appellants ran away from their usual residents after the offence was



committed on 20<sup>th</sup> December, 2019 and that was why they were only apprehended in March, 2020. This act of running away was not consistent with an innocent mind.

3.7. The lower Court found it odd that being found in close proximity, the Appellants still wanted to distance themselves from each other, even if some were merely 75 meters apart. This amounted to an odd coincidence and offered supporting evidence as to the relationship amongst the Appellants. The Appellants being in the same area in Kabitaka and positioned in the same place had ample opportunity to commit the offence.

3.8. Having established that the Appellants were at the 2<sup>nd</sup> Appellant's mother's bar on 20<sup>th</sup> December, 2019 and were positively identified as the ones who beat up the deceased, the trial Judge found PW1 to be a more credible witness compared to the Appellants who flatly lied in the vain hope of evading the offence.

3.9. The trial Court accordingly convicted the Appellants for the offence of murder.

#### 4. APPEAL

- 4.1. The Appellants, dissatisfied with the Judgment of the lower Court, launched their appeal assailing the High Court Judgment on one ground, as follows:

***“ The Lower Court erred in law and in fact when it convicted the appellants on the evidence of PW1 and PW2 who were suspect witness with an interest to serve which evidence was not corroborated by independent evidence to support the conviction”***

#### 5. APPELLANT’S ARGUMENTS

- 5.1. The gist of the Appellant’s arguments was centred around the evidence of PW1 and PW2, who in Counsel’s estimation, had an interest to serve. It was submitted that the lower Court’s analysis of the evidence had ignored the fact that these two witness had an interest to exonerate themselves. They had been detained as suspects and prior to that, did not bother to report, to the police, the alleged fight/beatings they had witnessed until after the apprehension of the Appellants.
- 5.2. The case of **Wilson Mwenya v the People** <sup>(1)</sup> was cited to demonstrate that the failure to report an incident, the

witnesses had an interest of their own to serve and their evidence required corroboration. Further, the case of **Andrew Mwenya v the People**<sup>(2)</sup> was cited in aid to address the issue of a witness with an interest of their own to serve.

- 5.3. It was also argued that the trial Court relied on the findings that the all the Appellants fled the areas where the offence was committed to buttress the conviction of the Appellants as the act of running away after a crime is committed is inconsistent with an innocent mind. However, the case of **Kuyewa v The People**<sup>(3)</sup> was cited to show that evidence of running away is not on its own, conclusive evidence of guilt, unless on the totality of the evidence there are other various pieces of evidence sufficient upon which to base a conviction.
- 5.4. The Appellants' living in proximity with each other only corroborated the fact that the Appellants knew each other but did not in any way corroborate the fact that it was the Appellants who committed the offence.
- 5.5. Lastly, it was submitted that that the opportunity of being in close proximity with each did not raise any element of suspicion which may qualify that opportunity as corroboration to the commission of the offence. The case of



**Ives Mukonde v The People** <sup>(4)</sup> was cited in aid. We were implored to allow the appeal.

## 6. RESPONDENT'S ARGUMENTS

- 6.1. In response, the State submitted that a witness cannot automatically be categorized as one with an interest to serve without grounds discernible from the evidence to sustain such an assertion. Although PW1 and PW2 were picked up by the Police during investigations, there was no evidence to suggest that indeed they had an interest of their own to serve or a motive to falsely implicate the Appellants. The cases of **Nalisa Sikota v the People**<sup>(5)</sup> and **Andrew Mwenya v The People (supra)** were cited to buttress this argument.
- 6.2. It was contended that the two witnesses had no desire to exonerate themselves in conformity with the finding of the trial Court that there was no evidence to show that they were implicated in the murder.
- 6.3. With regard to failure to report the case to the police, the State submitted that the reasons were not solicited during cross examination.
- 6.4. As an alternative argument, the State submitted that should the Court be inclined to hold that the witnesses had an

interest to serve, their evidence was sufficiently corroborated. The trial Court found PW1 more credible and believed her and had the occasion to observe her demeanor as she testified. The case of **Webster Kayi Lambwe v The People** <sup>(6)</sup> was cited to remind us that an appellate court will not interfere with a trial court's finding on the issue of credibility unless it is clearly shown that the finding was erroneous.

- 6.5. The State agreed with the findings of the lower Court when it rejected the explanation proffered by the Appellant and contended that their conduct after the offence was suspicious, odd and inconsistent with innocence. In the State's view, a look at the totality of the evidence on record, the Appellants' conduct pointed to their guilt.
- 6.6. With regard to opportunity, it was submitted that all the Appellants lived and worked in the same area and had the opportunity to commit the offence. based on the totality of the evidence and the circumstances alluded to, the State submitted that the Appellants' conviction was safe. We were urged to dismiss the appeal.

## 7. OUR DECISION

7.1. We have considered the Record of Appeal, the impugned Judgment and the Arguments filed by the Parties. The Appellants tendered only one ground of appeal in relation to the evidence of PW1 and PW2 which formed the basis of the Appellants' conviction.

7.2. There are different categories of witnesses with a possible interest to serve. In this particular instance we are dealing with witnesses who were apprehended as co-suspects in the murder of the deceased and then later released.

7.3. In the case of **Kaumba Sitenge v The People** <sup>(7)</sup> we had occasion to deal with the evidence of a witness who fell within this category. In that case, we found as follows;

*“had the trial Court properly directed its mind to the possibility of PW2 being a witness with a possible interest to serve, in the circumstances of the case, where she was detained for six days, did not report what she knew about the case, but only did so after being prompted, he would not have relied on her evidence alone to convict the appellant”.*



- 7.4. In the cited case we placed reliance on the case of **Wilson Mwenya v the People** <sup>(8)</sup> in which the Supreme Court categorically stated that where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence of such a witness requires corroboration.
- 7.5. The facts of this matter clearly indicate that the deceased's relatives only reported the matter on 25<sup>th</sup> March, 2020, almost three months after it occurred and that was when PW8 received the docket.
- 7.6. It is also evident from the record that PW1 and PW2 were both detained in connection to the offence. PW7 indicated, during cross examination, that his brother, PW2 and PW1 were both detained together with another group of people. This evidence was corroborated by PW8, who, in cross examination, indicated that according to the information he received from his supervisors, PW1 was picked up first and detained for further investigation. He also confirmed that PW2 was also detained because he was a witness.
- 7.7. The two witnesses, PW1 and PW2, were the State's star witnesses. The trial Court, at J25 found that there was no

evidence to show that they were in any way implicated in the murder and thus had no need to exonerate themselves. The trial Judge further stated, at J26, that the two witnesses were consistent in their evidence and presented calm demeanors as they testified without presenting any signs that they were concocting their stories.

7.8. We are alive to the law that where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing the witnesses will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that the trial judge has fallen into error. This principle has its roots in the case of **Webster Kayi Lumbwe v The People (supra)** cited by the State.

7.9. However, we have arrived at the same conclusion as we did in the case of **Kaumba Sitenge v The People (supra)** that where a witness is detained, the evidence tendered by such a witness cannot stand alone, it must be corroborated.

7.10. In this case the evidence of both PW1 and PW2 ought to have been treated with caution and required corroboration in order for the State to secure a conviction. Albeit the trial Judge having made a finding on the credibility of the two



witnesses, he misdirected himself when he ignored the fact that the two witnesses, by virtue of being detained in connection with the incident, found themselves in a category of witnesses with a possible interest to serve and whose evidence required corroboration. Had the court properly directed its mind to this requirement, he would not have treated PW1 and PW2 as ordinary witnesses.

7.11. That being said, we find that PW1 and PW2 were witnesses with an interest to serve and their evidence could not stand alone.

7.12. The question that remains to be answered is whether there was something more on the record to corroborate the evidence of PW1 and PW2. We have painstakingly perused the record and find that the trial Judge simply made inferences from the remaining facts on the record and did not even consider whether the inferences he made were the only possible inferences.

7.13. The Appellants all denied having been at the scene, having committed the offence, having known each other or even knowing PW1 and PW2.

7.14. The trial Judge also made the following finding:



*“it is thus inconceivable at a distance of barely 150 meters from his house A1 did not hear or see anything when this was happening right at his shop so close by. This is only possible because A1 run away after committing this offence.”*

This finding was not supported by any other evidence on the record.

- 7.15. We further note that the trial Judge concluded and made a finding of fact that the Appellants had fled the scene purely based on the fact that, when the police were trying to apprehend them, they were not found at their homes.
- 7.16. However, the record will show that the incident occurred in December, 2019 and was only reported in March 2020. We see no reason as to why not finding a person at their place of residence is an odd coincidence or evidence pointing to guilt, especially in relation to an offence that occurred three months earlier.
- 7.17. The trial Judge also made an inference that the Appellants ought to have known each other and having lived in the

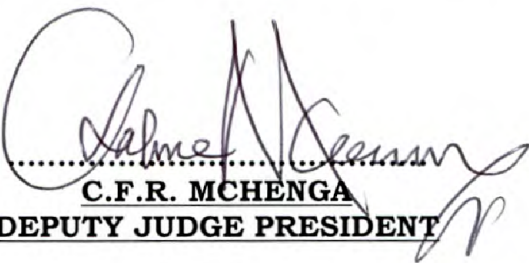
same area, in Kabitaka, a few meters apart, this provided them with the opportunity to commit the offence.


7.18. Surely these cannot be the only inferences that can be drawn from the facts. PW1 and PW2's evidence could not stand on its own without corroboration or "something more" and without the evidence of these two witnesses, the prosecution's case had no leg to stand on.

7.19. We find that the State did not discharge its burden of proof to the required standard, that is, beyond a reasonable doubt. We accordingly find merit in the Appeal.

## **8. CONCLUSION**

8.1. The conviction is therefore quashed and the sentence set aside. Accordingly, the Appellants are acquitted forthwith.

  
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**C.F.R. MCHENGA**  
**DEPUTY JUDGE PRESIDENT**

  
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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**

  
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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**