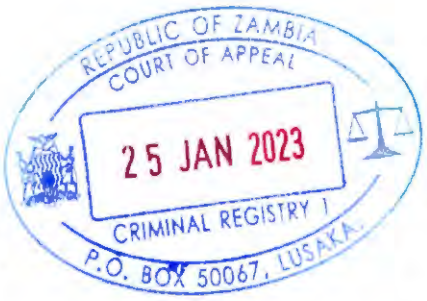
IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APP. Nos. 71, 72, 73, 74, 75, 76, 77, 78/2022

BETWEEN:



FRANK CHIKOTI	**1ST APPELLANT**
KENNI SINYINZA	**2ND APPELLANT**
DICKSON CHELA	**3RD APPELLANT**
DANNY SIWAKWI	**4TH APPELLANT**
VINCENT SIMWANZA	**5TH APPELLANT**
GIDEON SIMBEYE	**6TH APPELLANT**
LEWIS KATONGO	**7TH APPELLANT**
JONATHAN SILUNGWE	**8TH APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Muzenga JJA
On 16th November, 2022 and 25th January, 2023

For the Appellant : Mr. B.M. Kapukutula, Legal Aid Counsel of Legal Aid Board.

For the Respondent : Mr. V. Musiku, State Advocate, National Prosecution Authority.

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Yokoniya Mwale v The People SCZ Appeal No. 285 of 2014
2. Dickson Sembauke v The People (1988 - 1989) ZR 144
3. Tembo v The People (1972) ZR 220

4. Victoria Kansembe v The People SCZ Appeal No. 286/2014
5. Choka v The People (1978) ZR 243
6. Nyampande v The People (1988 - 1989) ZR 163
7. Davies Mwape v The People (1979) Z.R. 54
8. Musonda & Another v The People (1976) Z.R. 218
9. Steven Nyoni v The People (1987) Z.R. 99
10. Tembo v The People (1974) Z.R. 286
11. Clever Chalimbana v The People (1977) Z.R. 282
12. Wilson Mwenya v The People (1990 - 1992) ZR 24

LEGISLATION CITED:

1. The Penal Code Chapter 87 of the Laws of Zambia.
2. The Juveniles Act Chapter 53 of the Laws of Zambia
3. The Children's Code Act No. 12 of 2022

1.0 INTRODUCTION

1.1 The appellants were charged and convicted of the offence of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia.

1.2 It was alleged that Frank Chikoti (A1), Kenni Sinyinza (J2), Dickson Chela (J3), Danny Siwakwi (J4), Vincent Simwanza (J5), Gideon Simbeye (J6), Lewis Katongo (J7) and Jonathan Silungwe (J8) on 24th October, 2019, at Nakonde in the Nakonde District of the Muchinga Province of the Republic of Zambia, jointly and whilst acting together, did murder one Jacob Simukonda.

2.0 **EVIDENCE BEFORE THE TRIAL COURT**

2.1 At the commencement of trial, the learned judge stated that he would treat A1 as an adult and the rest of the appellants as juveniles on account of their physical appearance. At page 13, the record of appeal shows that a Social Welfare Officer was brought in to represent the juveniles. However, when the matter came for defence, the record shows at page 49 that only parents to J5 and J7 attended court.

2.2 The prosecution called two witnesses: Musonda Katema (PW1) and Detective Inspector Joel Katangochi (PW2). PW1 testified that on 24th October, 2019 he spent the day in the company of J3, J6 and J7. After drinking alcohol, they went to J3's home for J3 to change his shoes. Thereafter they proceeded to a place named Tolatola where they continued inebriating. Later, at around 20:00 hours, they escorted three ladies to Kadansa Village.

2.3 Owing to the number of people and the noise emanating from the bars, PW1 got separated from the trio. He decided to return home using the tarred road. On the way, he found 'Tatizo', J7, J6, J2, J8 and 'Junior' (A1) talking to someone. He heard J8 telling that person that he was rude and punched him with his

fist. J4, had a knife and wanted to stab the man. Instead, A1 got the knife from J4 and stabbed the person in the stomach. Musonda Katema (PW1) was able to see what was happening on account of the lights emanating from the shops.

2.4 Thereafter, J2, J3 and J4 started punching the person with their fists. The man fell down, held his stomach whilst the above continued to beat him. Shocked at what he had seen, PW1 ran away. J7 pursued him, punched him and he fell down. J3 followed them and stopped J7 beating PW1. J3 warned PW1 that he would be killed if he reported what he witnessed. A day later, the police went to Musonda's home with J3 and apprehended him. PW1 remained in custody for a period of six months before he was released.

2.5 PW2, investigated the matter and apprehended the appellants. During a search conducted at the home of J2's parents', a blood stained knife was recovered from the pockets of J2's jeans trousers.

2.6 In his defence, A1, Frank Chikoti told the court that he was apprehended at 06:00 hours on 24th October, 2019 after J3 led the police to him. While in custody, he met PW1 for the first

time. On 24th October, 2019 he was at home from 19:00 hours to the following morning.

2.7 J2, Kenni Sinyinza denied committing the offence stating he was at the shop from 06:00 to 18:00 hours on 24th October, 2019 before going home. At 03:00 hours, he was apprehended by the police led by J3. He denied having anything to do with the knife said to have been found in his clothes. He conceded that he did not inform the police who he was with on 24th October, 2019.

2.8 J3, Dickson Chela testified on 24th October, 2019, he was at home with his parents when PW1 came and left a bag at the door before running away. The bag was discovered later by his father who threw it into the flower bed. At 06:00 hours, some pupils came and claimed that PW1 stole a bag containing books during the night. As J3 was leading the pupils to PW1's house, he was apprehended by the police who were also looking for PW1. Due to the torture at the hands of the police, he implicated PW1 and all the other appellants.

2.9 J4, Jonathan Silungwe stated in the court below that on 24th October, 2019, he was at home with his parents when police arrived and apprehended him led by J3. He denied knowing

PW1, J2 and J6 stating that he was seeing them for the first time. The witness claimed that PW1 was in detention for 8 months with them.

2.10 He claimed to have been at work in Tanzania with Francis, John, Kel and Aaron on 24th October, 2019 from 06:00 to 18:00 hours when he returned home where he remained until following day. In cross-examination, he denied being friends with the other co-accused persons, though they all live in Ntindi Village. That he did not know of any reason as to why PW1 and J3 would falsely implicate him.

2.11 J5, Vincent Simwanza testified that he was at his barbershop from 06:00 to 18:00 hours on 24th October, 2019. At midnight on 26th October, 2019 he was apprehended when J3 came with the police. J3 unformed him that he (J3) was apprehended because of a bag. He denied knowing who PW1 was.

2.12 As for J6, Gideon Simbeye he stated that he was at the shop from 06:00 to 18:00 hours on 24th October, 2019. He was apprehended by the police at 03:00 hours who were led by J3. He denied knowing PW1 and J3.

2.13 J7, Lewis Katongo testified that he was unwell on 24th October, 2019 and slept in the house until the next day. Around 15:00

hours on 25th October, 2019 his aunt, whose name he does not recall know, asked him to go to church with her. They slept at church and returned home the next day at 06:00 hours. At around 08:00 hours, the police led by J3 came and apprehended him. At the police, J3 told him that he was apprehended because of the books. He denied being friends with PW1 or J3 though they lived in the same village.

2.14 J8, Jonathan Silungwe told the court that on 24th October, 2019, he spent the morning helping his grandmother and proceeded to assist in his uncle's shop untill 14:00 hours. He later went to cut his hair. At 17:00 hours J8 went back to his grandmother's place. He went home at 18:00 hours and remained there until 03:00 hours when he was apprehended by the police led by J3. J3 told him that he had been apprehended because PW1 stole some books. He denied knowing PW1 and J3. In cross-examination, he stated that J3 implicated him on account of the stolen books.

3.0 **DECISION OF THE COURT BELOW**

3.1 The court recognized that PW1 was a witness with an interest of his own to serve and warned itself of the dangers of convicting on the uncorroborated evidence of such a witness to avoid the

danger of false implication. With respect to the corroboration of the evidence of such a witness, the trial court was guided by the case of **Yokoniya Mwale v The People** [1] that what is key is for the court to satisfy itself that there is no danger of false implication.

3.2 The court found that as the appellants and the deceased all lived in Ntindi Village, they had the opportunity to commit the offence. J3 knew all the co-accused persons. J7 did not dispute the story of PW1 that he chased and beat him. A1, J4 and J8 could not state why PW1 would falsely implicate them in the murder. As regards the bag of books, the trial court found that J3 lied when he implicated J3, J5, J7 and J8 as this did not come up in PW2's testimony or cross-examination.

3.3 Consequently, the court found PW1 to be a credible and reliable witness with no motive to falsely implicate the appellants. In any case the court reasoned that, it was J3 who led the police to PW1 and the other appellants. As PW1 withdrew from the others who attacked the deceased, which position was not challenged by J7, he was not party to the killing of the deceased.

3.4 The alibis of the appellants were dismissed by the court below as lies having been raised late in the day with no evidence or witnesses to support them.

3.5 The court from its ocular observation found A1, J2, J3 and J4 to be adults and sentenced them to life imprisonment. J5, J6, J7 and J8 were held to be juveniles and reformatory orders made against them.

4.0 **GROUNDS OF APPEAL**

4.1 Three grounds of appeal have been advanced as follows:

1) ***The trial court erred in law and in fact when it convicted the appellants of the offence of murder when the weight of the evidence proved otherwise;***
2) ***The lower court erred in law and in fact when it convicted the appellants on the strength of the testimony of Musonda Katema (PW1) a suspect witness whose evidence was not corroborated; and***
3) ***The learned trial court erred in law and in fact when it tried the 2nd to the 7th appellants as juveniles but sentenced the 2nd to the 4th as adults contrary to its finding and ruling based on ocular observation.***

5.0 **ARGUMENTS BY THE APPELLANTS**

5.1 In ground one, it is submitted that the evidence of PW1 shows that there was an altercation in which there was punching and the use of the word 'rude'. We were referred to the case of

Dickson Sembauke v The People [2] that murder is a crime which requires a specific intent or specific frame of mind for which the prosecution must adduce evidence.

5.2 It was submitted that there was no evidence from the prosecution that the appellants intended to cause grievous harm or had the specific intent to cause the death of the deceased. Therefore, the element of malice aforethought was not proved because the appellants were said to have fought the deceased.

5.3 In the alternative, we were urged to find the appellants guilty of the lesser offence of manslaughter on the basis that there was provocation. For authority, we were referred to the case of **Tembo v The People** [3] where it was held that:

> ***An argument followed by a fight can amount to provocation sufficient to reduce from murder to manslaughter a fatal blow struck with a lethal weapon in the heat of such fight.***

5.4 The case of **Victoria Kansembe v The People** [4] was also cited where the court was of the view that a charge of murder in circumstances were there was an altercation was inappropriate as the evidence did not establish malice aforethought.

5.5 In ground two, it is contended that the evidence by PW1a suspect witness was not corroborated. PW1 was argued to be a suspect witness, hearing been incarcerated together with the appellants in connection with the subject offence. The case of **Choka v The People** [5] was cited in support as authority.

5.6 Ground three, assails the sentencing of the 2nd to the 4th appellants as adults. It was submitted that the trial court indicated that it had noted that the offence was allegedly committed in October, 2019 and that J2 to J7 looked reasonably young, and that at the time of the commission of the offence, they may have been juveniles. The learned judge then proceeded to treat them as such. The trial court having made such a finding, it was not in order for the lower court to proceed to treat the appellants as adults and not juveniles. Therefore the court erred accordingly.

5.7 Reference was made to **section 118 of the Juveniles Act Chapter 53 of the Laws of Zambia** which was applicable at the time, and submitted that the court below was bound and *functus officio* on the age of the appellants having earlier found that they are juveniles. Therefore they should have been sentenced as juveniles.

5.8 Tit was prayed that the appellants be acquitted and set at liberty. In the alternative, we were urged to sentence the 2nd to the 4th appellants as juveniles, and not as adults.

6.0 **ARGUMENTS BY THE RESPONDENTS**

6.1 On behalf of the respondent, the learned State Advocate submitted in ground one that all the eight appellants participated in assaulting the deceased as per evidence adduced by PW1. That they united as a group against the deceased, who was alone which was in itself an aggravating factor. Therefore, it should have been foreseeable that beating up one person might at best cause grievous harm and at worst, death.

6.2 Therefore, malice aforethought was proved as the appellants knew that stabbing and beating a person is likely to cause death or grievous harm to the victim.

6.3 It was submitted that the defence of provocation based on an altercation was not raised during defence, therefore, the appellants cannot rely on it at this stage.

6.4 In ground two, it was contended that the record shows that the trial court properly warned itself of the danger of convicting on the basis of the evidence of a witness with possible interest of his own to serve. Guided by the case of **Nyampande v The**

People [6], the trial court went further to ensure that the possibility and danger of false implication had been eliminated. The trial court then made a finding of fact that PW1 was not only credible but a reliable witness who withdrew from his friends who had attacked the deceased.

6.5 In respect to ground three, the respondent graciously conceded that the trial court did in fact err in law when it sentenced J2, J3 and J4 as adults after they had been tried as juveniles.

7.0 **DECISION OF THIS COURT**

7.1 We have considered the record of appeal, the authorities cited and the arguments advanced by the learned counsel. We propose to begin with ground three.

7.2 In ground three, it is contended that the trial court erred when it tried J2 to J7 as juveniles but sentenced J2, J3 and J4 as adults contrary to its earlier finding and ruling based on ocular observation.

7.3 Upon perusing the record of appeal, we note that the learned judge proceeded with trial after making a determination based on ocular observation that A1 is an adult and that the rest of the appellants are juveniles.

7.4 The Supreme Court guided in **Davies Mwape v The People** [7] that:

> ***(i) Under s. 118 (1) of the Juveniles Act, it is sufficient for a court to rely solely on ocular observation, and if it appears that an offender is a juvenile, an inquiry must be made to ascertain his exact age for the purpose of considering the powers of the court in relation to such offender. However where by ocular observation the offender is obviously an adult, the court is not put on its inquiry.***
>
> ***(ii) When such inquiry has been made, the provision that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person was not correctly stated or estimated by the court comes into effect, and there cannot be any appeal on the question of age, provided that the inquiry made was a due inquiry and not defective in any way. Where no such enquiry has been made the finding as to the offender's age is appealable.***

7.5 Further, in **Musonda & Another v The People** [8] it was held that when a trial court receives its first indication that the appellants might be juveniles, it should immediately conduct an inquiry as to the appellants' ages.

7.6 In that regard, the trial court properly guided itself with respect to A1 having made an ocular observation that he was an adult. However, as regards the other appellants, we wish to guide trial courts, that they are duty bound to make due inquiry in order

to ascertain the age of any person charged with an offence that appears before the court.

7.7 To this end, the now repealed **section 118(1) of the Juveniles Act Chapter 53 of the Laws of Zambia** provided that:

> ***"118(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a juvenile, the court shall make due inquiry as to the age of that person, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to or estimated by the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person and, where it appears to the court that the person so brought before it has attained the age of nineteen years, that person shall, for the purposes of this Act, be deemed not to be a juvenile."***

7.8 Following the repeal of the Juveniles Act, **section 71(1) and (2) of the Children's Code Act No. 12 of 2022** has further entrenched this requirement by requiring that a birth certificate or an affidavit be produced to confirm the age. In the absence of a birth certificate or an affidavit sworn for the purpose of certifying a person's date of birth, a certificate signed by a

health practitioner as to the age of the person being below nineteen years of age will suffice.

7.9 The said **section 71(1) and (2) of the Children's Code** provides as follows:

> ***71. (1) Where a person, whether charged with an offence or not, is brought before a court and it appears to the court that the person is a child or the person alleges that the person is a child, the court shall make an inquiry as to the age of that person.***
> ***(2) In the absence of a birth certificate or an affidavit sworn for the purpose of certifying a person's date of birth, a certificate signed by a health practitioner as to the age of a person below nineteen years of age shall be evidence of that age before a court without proof of signature, unless the court directs otherwise.***

7.10 In this case, the record shows that upon sight of the appellants, the trial court initially ordered for a medical examination to ascertain the ages of the appellants. However, this failed on two attempts as the court was informed that the medical officer to examine the appellants was outside the district. The court them made a finding based on ocular observation that the appellants looked reasonably young and that it would treat them as juveniles.

7.11 We take the view that the trial court should have gone further to hold an inquiry than to simply rely on ocular observation. Had the court held an inquiry, it would not have misdirected itself by revisiting and invalidating its initial finding at the time of taking plea that J2 to J8 were juveniles. It was therefore a misdirection to hold that J2, J3 and J4 were in fact adults and sentencing them as such.

7.12 We are fortified in so holding in view of the case of **Steven Nyoni v The People** [9] were it was held that:

> ***"A person who is no longer a juvenile who had committed an offence when he was a juvenile should be tried as an adult in the appropriate court; but for the purpose of sentencing he should be treated as a juvenile."***

7.13 We further wish to guide that in terms of **section 127(1) of the Juveniles Act**, parents or guardians of the juvenile may be required to attend court but must attend if they can be found and reside within a reasonable distance unless the court is satisfied that it would be unreasonable to require the attendance of a parent or guardian.

7.14 **Section 127 of the Juveniles Act** is in the following terms:

> ***"127(1) Where a juvenile is charged with any offence, or is for any other reason brought before a court, his parent or guardian may in any case, and shall if he can be found and resides within a reasonable distance, be required to attend at the court before which the case is heard or determined during all the stages of the proceedings, unless the court is satisfied that it would be unreasonable to require his attendance."***

7.15 However, **Section 68(2)(e) of the Children's Code** is couched in mandatory terms and is made reference to for emphasis, as it is not applicable in casu. It stipulates that:

> **(2) A person shall not be present at a sitting of a juvenile court or Children's Court, except—**
> ***(e) "a parent, guardian or person having parental responsibility for the child;"***

7.16 To this end, in **Tembo v The People** [10], the Supreme Court emphasized that:

> ***"Section 127 of the Juveniles Act, Cap. 217, stresses the importance which the legislature attaches to the attendance wherever possible, during all stages of the proceedings, of the parent or guardian of a juvenile, and sets out in detail the procedure to be adopted and the circumstances in which such attendance may be dispensed with. In all cases the record should disclose that these provisions have in fact been complied with and, where the parent or guardian is not required to be present, the reasons why his attendance has been dispensed with should be stated."***

7.17 Further, in **Clever Chalimbana v The People** [11] the court gave the rationale for the attendance of parents at the trial of a juvenile when it held that:

> ***"The important consideration is that if these provisions are not complied with the juvenile may be prejudiced."***

7.18 While it is evident that the parents of the juveniles were absent during trial, we note that the record does not disclose the reasons why their attendance was dispensed with. The provisions of the Juveniles Act require that the court makes a note on the record why the parents are absent and its reason for dispensing with their attendance. For this reason, we find that the absence of the parents or guardians of the juvenile appellants throughout trial, prejudiced the juveniles, that is, J2, J3, J4, J5, J6, J7 and J8.

7.19 On this basis alone, we would have been inclined to order a retrial of the matter but the matter does not end here.

7.20 In ground two, it is contended that PW1 is a suspect witness having been among the appellants at the time the deceased was stabbed and that he was also detained in police custody for six months as a suspect for the murder of Jacob Simukonda.

7.21 We accept that PW1, who is also a friend of the appellants, was with most of the appellants from morning till the time the deceased was stabbed to death. The appellants sought to distance themselves from his association claiming that they either did not know him though they lived in the same Ntindi Village, or that he implicated them on account of a school bag he allegedly stole.

7.22 We find the story of the school bag to be unbelievable and in no way connected to the offence of murder. Indeed, there was no evidence led by any other witness that a bag was stolen and dumped at J3's home. The issue of the school bag was in fact, only raised in defence, just like the alibis given by the rest of the appellants. Therefore, we find the issue of the school bag and alibis tendered to be nothing more than an afterthought.

7.23 As for PW1, we find that he is indeed a suspect witness whose evidence requires circumspection. It is trite that the evidence of such a witness requires corroboration or something more to exclude the danger of false implication.

7.24 In **Wilson Mwenya v The People** [12], it was held that:

> ***"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect***

him with the crime. It may be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."

7.25 The only eye witness to the murder to testify on behalf of the prosecution was PW1 whose evidence is suspect. This witness testified that J4, who had a knife, wanted to stab the deceased but that A1 got the knife and stabbed the deceased in the stomach. During the course of investigations, PW2 recovered a blood stained knife from the trouser pockets of J2. PW1 was in detention for a period of six months together with the appellants on suspicion of murder. We hold the view that there was no other independent evidence to confirm the testimony of PW1 as to what may have transpired on the date of the murder.

7.26 In these circumstances, we find that the danger of a fabricated story in this case, has not been excluded. We find no independent evidence on record corroborating the evidence of PW1. On his evidence, we are unable to hold that the appellants jointly and whilst acting together stabbed the deceased as alleged by this witness. We find merit in ground two and hold that the prosecution did not prove the offence against the appellant beyond reasonable doubt.

8.0 **CONCLUSION**

8.1 For the forgoing reasons, we find it unsafe to uphold the appellants' convictions. Therefore, the convictions, sentence and orders made by lower court are accordingly quashed and set aside. We hereby acquit the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th appellants and set them at liberty forthwith.

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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT

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F. M. Chishimba
COURT OF APPEAL JUDGE

.....

K. Muzenga
COURT OF APPEAL JUDGE