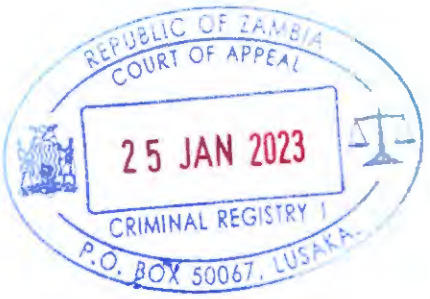
IN THE COURT OF APPEAL OF ZAMBIA **APP. No. 68/2022**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:



OBVIOUS MATAMBO **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. Banda, Legal Aid Counsel of Legal Aid Board

For the Respondent : Ms M.I. Mwala – Senior 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. David Zulu v The People (1977) ZR 181
2. R v Cargill (1913) 2 KB 271
3. Hart v Lancashire & Yorkshire Railway Company (1868) 21 LT 261
4. Mbomena Moola v The People (2000) ZR 148
5. Chanda & Chisanga v The People SCZ Appeal No. 104 of 2011
6. John Mwansa & Samuel Mwansa v The People SCZ Appeal No. 170 & 171 of 2014
7. Abel Banda v The People (1986) ZR 105
8. Ilunga Kabala & John Masefu v The People (1981) ZR 102
9. Modester Mulala v The People SCZ Appeal No. 51/2013

10. Joachim Kingsley Kawama & Elias Mwansa Smart v The People SCZ Appeal No. 37 & 38 of 2015
11. Abedinegal Kapesha & Best Kanyakula v The People Selected Judgment No. 35 of 2017
12. Ezious Munkombwe & Others v The People CAZ Appeal No. 7,8,9 of 2017
13. Muwowo v The People (1965) Z.R. 91
14. Major Isaac Musongo v. The People
15. George Musongo v. the People 1978 ZR 378

LEGISLATION CITED:

1. The Penal Code Chapter 87 of the Laws of Zambia.

1.0 INTRODUCTION

1.1 The appellant was 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 The particulars alleged that Obvious Matambo on 6th April, 2020, at Kasempa in the Kasempa District of the Copperbelt Province of the Republic of Zambia, did murder Chuma Bright.

2.0 FACTS

2.1 The summary of the evidence before the trial court was that at around 19:00 hours on 6th April, 2020, Bright Chuma (the deceased) was seated in the kitchen shelter with his wife, Iness Chuma (PW1) and their children, among them, PW2, Arthur Chuma. The deceased gave PW1 a torch to enable her take the children into the house to sleep. As PW1, the children and PW2

proceeded towards the house they heard the sound of a gunshot. The deceased shouted stating that someone had killed him, ran a few steps and fell to the ground.

2.2 PW1 and PW2 rushed back to the deceased. They observed that the shirt on his back was covered in blood and torn. Chuma Bright was also bleeding from the nose and mouth. PW2 ran to the home of the appellant to inform him of what had happened. PW2 found the appellant entering his house. After informing him, they rushed back to the home of the deceased.

2.3 PW1 and PW2 further testified that at one point, the appellant and his young brother, nephews of the deceased, had accused the deceased of witchcraft and threatened him stating as follows; "*You want to die. You have seen the sun rise but the sunset, you will not be able to see it.*" A week later, someone shot at Bright Chuma while he was bathing. Bright complained to his mother about the threats and shooting incident. A family meeting was held at which the appellant apologized for the threats issued earlier.

2.4 A week after the above incident, a scared Bright had returned from the field without a shirt stating that a gunshot was fired at him whilst he was in the field. The Village Headman called

for a meeting and urged everyone to live in peace. On the 6th April, 2020, the deceased was shot dead.

2.5 PW3, Chrispine Tutwa and PW4, Paul Nkausu are members of the CCPU. During the night of 6th April, 2020, they were assigned by their group leader to go to Kabusenga area following a report of the shooting of the deceased. They found that Bright Chuma had indeed been shot to death. The police were informed and the following morning the body was picked. The police were said to have asked them to find the person who had shot the deceased.

2.6 Acting on information from residents of Kabusenga area that the appellant had recently acquired a fire arm, a meeting was called the following day attended by the appellant, his brother Richard Matambo and other family members. During the meeting, the group leader, a Mr. Kiboko Mwatula asked the appellant if he had acquired a gun. After initially denying, the appellant admitted that he had recently bought a gun, which he fired recently, whilst trying it out in the field.

2.7 PW3 and PW4 were assigned to accompany the appellant to retrieve the gun. The appellant was handcuffed to prevent him from running away. The appellant led the two men to a bush

about 800m away from his house where he retrieved the gun near a fallen Mutondo tree which was covered in grass and dry leaves.

2.8 The appellant at the meeting admitted that the gun had been fired recently and that it was the one that he used to kill the deceased. Later, the police came and the appellant was handed to them together with the gun.

2.9 PW5, Detective Sergeant Kalizya Nyachiu investigated the matter. He produced into court as evidence, the muzzle loading gun-P1, 4x pellts-P2, forensic ballistics report-P3 and the postmortem report-P4. Under warn and caution, the appellant remained silent.

2.10 In his defence, the appellant denied committing the offence. He testified that he was at home when PW2 came to inform him of the death of his father and went to view the body. When the police came the next day and asked as to who had shot the deceased, the villagers said they had not seen anyone. PW1 said she could not recall anyone differing with the deceased.

2.11 On 10th April, 2020, the appellant and his entire family were summoned to appear before Headman Kiboko at a school where a lot of people had assembled. He was handcuffed and taken to

where the headman was seated. The appellant was told that he should bring his gun on that day or else he would be beaten. The appellant accompanied by CCPU persons went to retrieve the gun. On their way back to the assembled meeting, the appellant was asked by the CCPU members if he had used the gun to shoot his uncle. The members continued slapping him until they returned to the meeting place.

2.12 When the headman asked the appellant whether he had killed his uncle, the appellant denied. The appellant was later that day handed to the police together with the gun.

3.0 DECISION OF THE COURT BELOW

3.1 The trial judge found that there was no material challenge to the evidence of PW1 and PW2 as to the differences between the deceased and the appellant. The court further found that the appellant and his brother issued death threats to the deceased which they later tendered an apology.

3.2 The court noted that though PW1 and PW2 can be classified as witnesses with a possible motive to serve, their demeanour was respectful and composed. Further that they never made direct allegations that the appellant killed the deceased. The court

found them to be credible witnesses and was satisfied that the danger of false implication had been eliminated.

3.3 The trial court also accepted the evidence of PW3, PW4 and PW5 that the gun recovered from the appellant had recently been fired as confirmed by the ballistic report.

3.4 The court reasoned that the fact that the appellant had threatened the deceased with death and apologized at a family meeting; that there were two incidents of a gun being fired at the deceased; that the appellant lived near the deceased and had acquired a gun which was found to have recently been fired; that the same gun was hidden in the bush; and the evidence of PW2 that he found the appellant entering the house after the shooting, all pointed to the appellant as the shooter.

3.5 Consequently, the appellant was convicted of the offence and sentenced to death.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the trial court, the appellant has advanced three grounds of appeal as follows:

1) ***The learned trial judge erred both in law and fact to convict the appellant on circumstantial evidence which had not attained the degree of cogency and taken the case out of the***

realm of conjecture to attain a degree of certainty for the court to feel safe to convict the appellant;

2) ***The court erred in both law and fact by drawing an inference favouring the State from facts before it without giving reasons for preferring it to the appellant; and***
3) ***In the alternative, that the court erred both in law and fact to impose a sentence of death where there exists extenuating circumstances.***

5.0 ARGUMENTS BY THE APPELLANT

5.1 Heads of argument dated 17th October, 2022 were filed on behalf of the appellant in which grounds one and two are argued together.

5.2 It was submitted that the circumstantial evidence relied upon by the trial court to convict the appellant had not taken the case out of the realm of conjecture as to permit only an inference of guilt as there were other facts which could have and can still cause the court to draw an inference of innocence.

5.3 These other facts included the possibility of another person other than the appellant killing the deceased in that the person who sold the gun to the appellant had fled and his identity was unknown. That the trial court should have taken judicial notice that it was not unusual for PW2 to find the appellant entering

his home at 19:00 hours as it is a notorious fact that would negate his presence at the crime scene or the *actus reus*.

5.4 Counsel submitted that the standard of circumstantial evidence espoused in the case of **David Zulu v The People** [1] had not been satisfied. That it was not in order for the trial court to consider the gun as relevant evidence in circumstantial evidence of 'malice aforethought'. The mere ownership of a gun , especially in a village setting like the community the appellant belonged where hunting is characteristic, does not suggest motive to commit murder.

5.5 In addition, it was contended that no finger prints were lifted from the gun allegedly used in the shooting for this fact to be relevant and admissible. The evidence of a gun and that the deceased had been shot at prior to the fatal shooting were said to be irrelevant pieces of evidence which the trial judge ought to have excluded as not being in issue. The case of **R v Cargill** [2] was cited as authority.

5.6 With respect to the apology tendered by the appellant at a family meeting, it was contended that this is not evidence per se, that he is the shooter. In support thereof, we were referred to the case of **Hart v Lancashire & Yorkshire Railway Company** [3].

5.7 With respect to admissibility and weight to be attached to the circumstantial evidence, it was argued that the trial court did not consider the weight to be attached to the evidence of prosecution witnesses. Further, the explanation tendered by the appellant was logical and unchallenged in a material particular especially that he rushed to check on the deceased when he learnt of the shooting.

5.8 It was submitted that the trial court did not advance reasons for preferring the evidence of the State as opposed to that of the appellant. The explanation tendered by the appellant was logical and unrebutted.

5.9 Ground three was argued in the alternative in the event that the first two grounds are disallowed. The gist of ground being that the trial court should have considered the evidence that the killing was in the belief of witchcraft that could have possibly absorbed the appellant from criminal liability, or to afford him an extenuating circumstance.

5.10 Counsel submitted that evidence shows that the appellant believed that his deceased uncle, was practicing witchcraft on him by stealing his clothes and crops in the field and thus wanted to get rid of him by killing him. The findings by the trial

court was perverse for neglecting this piece of evidence. Section **201(2)(a) and (b) of the Penal Code** provides for extenuating circumstances for purposes of sentence.

5.11 A plethora of decided cases to the effect that witchcraft can be an extenuating circumstance were cited, among them, **Mbomena Moola v The People** [4] and **Chanda & Chisanga v The People** [5]. We were urged to allow the appeal and set aside the conviction and sentence.

6.0 ARGUMENTS BY THE RESPONDENT

6.1 On 26th October, 2022, the respondent filed heads of argument. With respect to grounds one and two, it was submitted that the evidence upon which the appellant was convicted attained the required degree of cogency and took the case out of the realm of conjecture. Additionally, the lower court did not err in law and fact by drawing an inference favouring the prosecution from the facts before it. The court gave reasons for preferring the evidence of the prosecution to that of the appellant.

6.2 It was contended that the evidence connecting the appellant to the offence is the subject gun. An enquiry by PW3 following the shooting of the deceased revealed that the appellant had recently acquired a gun, which the appellant admitted. The

appellant led PW3 and PW4 to the recovery of the gun where he had hidden it. This evidence was not disputed.

6.3 We were referred to the case of **John Mwansa & Samuel Mwansa v The People** [6] where it was held that:

> ***".. it is a well-established principle that where the leading of the police to the scene or elsewhere, whether voluntary or not, has resulted in the discovery of real evidence or the discovery of anything else not already known to the police, the evidence of leading is always admissible."***

Therefore, the leading in this case resulting in the recovery of the gun, which is real evidence, is admissible, more so that the CCPU members are not persons in authority as guided in **Abel Banda v The People** [7].

6.4 The learned State Advocate further submitted that the evidence of PW5 reveals that during the postmortem examination, four pellets were found in the chest of the deceased. The ballistic report revealed that the gun recovered from the appellant was recently fired as evidenced by the presence of some darkish soot or black powder in the muzzle and that the four pellets appear to have been fired from the said gun.

6.5 There was also evidence adduced by PW1 and PW2 that the appellant, his brother, and the deceased had differences and

threats of death were once issued by the appellant. A gun shot was at one point fired at the deceased whilst he was bathing. At a family meeting later convened, the appellant apologized for the threats. This evidence was not disputed.

6.6 The trial court warned itself of the need to approach the evidence of PW1 and PW2 with caution as they were related to the deceased and extended family members of the appellant. The lower court found the evidence by PW1 and PW2 to be credible.

6.7 It was submitted that the issue of the appellant owning a gun and issuing threats to the deceased prior to the deceased being shot dead are relevant in this matter as they prove malice aforethought and that the killing of the deceased was premeditated.

6.8 The respondent drew our attention to the case of **Ilunga Kabala & John Masefu v The People** [8], and submitted that it is an odd coincidence that PW2 found the appellant entering his house after the shooting of the deceased. It is also an odd coincidence that the gun was hidden in the bush and covered in the ground with dry leaves and grass. Further that there was

evidence that the said gun had been fired recently as per the ballistics report.

6.9 It was contended that it is not reasonably true that when the appellant took possession of the gun, it neither had pellets nor gun powder residue in light of the evidence of PW3, PW4 and PW5 regarding the state of the gun when it was recovered.

6.10 As regards the absence of finger print evidence, it was submitted that this was not fatal to the case of the prosecution as the evidence against the appellant was overwhelming. Further, that the trial court analysed the evidence on record and gave reasons for preferring the evidence of the prosecution as opposed to that of the appellant.

6.11 In the face of conflicting stories, the trial court was entitled to make findings on credibility, having seen and heard the witnesses. The case of **Modester Mulala v The People** [9] was cited to support the above contention.

6.12 With respect to ground three, the respondent contended that there are no extenuating factors in this case to warrant any other sentence other than the sentence of death. The appellant denied committing the offence. He never brought out the issue of murdering the deceased as a result of his belief in witchcraft.

6.13 Reliance was placed on the case of **Jaochim Kingsley Kawama & Elias Mwansa Smart v The People** [10] in which the court held that there were no extenuating circumstances in that case because the appellants neither admitted committing the offence nor raised the belief in witchcraft as the reason for their actions. In addition the case of **Abedinegal Kapesha & Best Kanyakula v The People** [11] was cited where the Supreme Court guided that a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor.

6.14 The learned State Advocate urged us to dismiss the appeal against conviction and sentence.

7.0 DECISION OF THIS COURT

7.1 We have considered the appeal, the authorities cited and the arguments advanced. In ground one and two, the appellant argues that the circumstantial evidence upon which he was convicted of the offence did not attain the degree of cogency set in **David Zulu v The People** [1] and that the trial court drew an inference against the appellant without giving reasons for doing so.

7.2 In **David Zulu**, the Supreme Court guided that:

(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.***

7.3 We also noted in **Ezious Munkombwe & Others v The People** [12] that:

> ***" ... when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellant must be looked at in their totality and not individually."***

7.4 In the case at hand, it was not in dispute that the appellant and his brother made threats of death against the deceased whom they accused of witchcraft, stating as follows that, *"You want to die. You have seen the sun rise but the sunset, you will not be able to see it."* A week later, someone shot at the deceased while he was bathing. The deceased complained to his mother about

the threats and shooting incident. A family meeting was held at which the appellant apologized for the threats issued.

7.5 Further, it was common knowledge that the appellant had acquired a firearm, and that there were two incidents of unknown person firing a gun at the deceased. The appellant, being the only person known to have acquired a gun and having had serious differences with the deceased, can it be said that the only reasonable inference to be drawn from these facts is that it is the appellant who shot dead the deceased?

7.6 We note from the record that PW5, Detective Sergeant Kalizya Nyachiu investigated the matter and produced the muzzle loading gun-P1, 4x pellets-P2, the forensic ballistics report-P3 and the postmortem report-P4. The record reveals that it is not in dispute that the deceased died from gun-shot wounds. There is however no evidence to link the muzzle loading gun as the weapon from which the pellets that were recovered from the body of the deceased were discharged. The ballistics report-P3 produced by PW5 is silent on whether the pellets were discharged from the muzzle loading gun in issue. Further, the ballistics expert who examined the gun and prepared the report, did not appear in court to testify on his findings.

7.7 Therefore, it cannot be inferred that it is the muzzle loading gun belonging to the appellant belonging to the appellant that was unlawfully discharged on the deceased and caused the injuries that led to his death.

7.8 We now move on to the alleged confession statement on record. We have also observed that the court below relied on the confession allegedly made by the appellant to Headman Kiboko Mwatula, a group leader, in the presence of PW3 and PW4. These witnesses testified that during the meeting, Headman Kiboko Mwatula asked the appellant if he had acquired a gun. After denying twice, the appellant admitted that he had recently purchased a gun, which he had tested out in the field.

7.9 The Ballistics expert did not testify before the Court. The forensic ballistics report was tendered into evidence by the investigating officer. This was procedurally wrong. The maker of the report was required under the law to testify to his findings, especially in the circumstances of this case. Therefore the forensic ballistics report was wrongly admitted in evidence and is here by excluded.

7.10 PW3 and PW4 were assigned to accompany the appellant to retrieve the gun. It is not in dispute that the appellant was

handcuffed to prevent him from running away. The gun was recovered, and on returning to the meeting, the appellant allegedly admitted that it was the one that he used to kill the deceased.

7.11 For his part, the appellant denied making any such confession. He testified before the court that he and the entire family were summoned to appear before Headman Kiboko where he was handcuffed and taken to where the headman was seated. He was threatened that he would be beaten unless the gun was brought to them. The handcuffed appellant in the company of PW3 and PW4 went to retrieve the gun. On their way back to the meeting, he was asked by the CCPU members if he had used the gun to shoot his uncle and slapped all the way back.

7.12 When the headman asked if he had killed his uncle, the appellant denied. He was later that day handed to the police together with the gun.

7.13 From his evidence, it can be seen that the appellant denied making the confession. Even if it can be assumed that he made the confession, the evidence shows that it was made involuntarily under duress. Both PW3 and PW4, in their testimony, told the court that the appellant was handcuffed to

prevent him from running away. The appellant stated that he was handcuffed upon arrival at the meeting.

7.14 In these circumstances, we cannot hold that the confession was made freely and voluntarily. We refer to the case of **Major Isaac Musongo v. The People** (14) and the case of **George Musongo v. the People** (15) in which the court stated as follows:

> ***"However, the principle of fair conduct underlying the Judges rules are principles in their own right in dependently of those rules and unfair or improper conduct on the part of people other than police officers ca equally lead to the exclusion of evidence in the discretion of a court."***

Had the trial Judge properly exercised his discretion, he would have excluded the confession statement. For this reason, the confession allegedly made by the appellant to the village headman must be excluded for it was made in circumstances that were neither free nor voluntary.

7.15 We find that there is no other evidence that incriminates the appellant. Therefore, we are not satisfied that the available circumstantial evidence was so cogent leading to an inference of guilt as the only reasonable inference that can be drawn from the facts. In that regard, we find merit in grounds one and two.

7.16 In view of the position we have taken above, it becomes otiose for us to consider ground three.

7.17 Having found merit in the appeal, we hold that the prosecution did not prove the case beyond reasonable doubt. We accordingly hereby set aside the conviction and sentence imposed by the lower court. We forthwith acquit the appellant and set him at liberty.

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C. F. R. Mchenga
DEPUTY JUDGE PRESIDENT

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F. M. Chishimba
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE