IN THE COURT OF APPEAL OF ZAMBIA Appeal No.123,124/2021
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

SEVELINO ZULU — **1ST APPELLANT**
WATSON KACHENJELA — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

CORAM: Mchenga DJP, Makungu and Muzenga, JJA

On: 22ND March 2022 and 10th October 2022

For the Appellants: M.I. Lifunana with K. Kaumba, Likando Kalaluka & Company

For the Respondent: L. Zunduna, State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Director of Public Prosecutions v. Ng'andu and Others [1975] Z.R. 253
2. Malawo v. Bulk Carriers of Zambia Limited [1978] Z.R. 185
3. Musheni v. The People [1982] Z.R. 71
4. Madubula v. The People [1993-1994] Z.R. 90
5. Attorney General v. Kakoma [1975] Z.R. 212
6. The Attorney General v. Marcus Kampumba Achiume

[1983] Z.R. 1

7. Communications Authority v. Vodacom Zambia Limited SCZ Judgment No. 21 of 2009
8. Dorothy Mutale and Another v. The People [1995-1997] Z.R. 229
9. Saluwena v. The People [1965] Z.R. 4
10. Ilunga Kalaba and John Masefu v. The People [1981] Z.R. 102
11. James Mwango Phiri v. The People, SCZ Appeal No. 171 of 2015
12. Augustine Kapembwa v. Danny Maimbolwa and Attorney-General [1981] Z.R. 127
13. Kenmuir v. Hattingh [1974] Z.R. 162

Legislation referred to:

1. Zambia Wildlife Act No.14 of 2015
2. The Penal Code, Chapter 87 of The Laws of Zambia
3. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

1. INTRODUCTION

1.1. The appellants appeared before the Subordinate Court (Hon. W. Banda), charged with the offence of unlawful possession of a prescribed trophy contrary to **Section 130(2)(a)(b) of The Zambia Wildlife Act.**

1.2. They denied the charge and the matter proceeded to trial.

1.3. At the end of the trial, they were both acquitted of the charge.

1.4. The Respondent appealed against the acquittal.

1.5. The High Court (Maka, J.), allowed the appeal and convicted the two appellants. They were each sentenced to 5 years imprisonment with hard labour.

1.6. They have appealed against their convictions by the High Court.

2. CASE BEFORE THE TRIAL MAGISTRATE

2.1. On 20th February 2017, officers from the Department of National Parks and Wildlife (DNPW) in Livingstone, received intelligence information that someone was trafficking in ivory.

2.2. The information included details of the motor vehicle and the area, the trafficker was likely to be found.

2.3. About 12 DNPW officers set out for Livingstone's Kashitu Compound, where they lay an ambush.

2.4. In the early hours of 21st February 2017, a motor vehicle that was being driven by the 1st appellant

appeared in the area. The 2nd appellant was his passenger.

2.5. The DNPW officers surrounded the motor vehicle and ordered the 1st appellant to stop, he did not. He only stopped after pepper spray was discharged into the motor vehicle's open window.

2.6. On being questioned, according to one of the DNPW officers, the 1st appellant said ***"Nanyamula Minyanga"*** (I am carrying tusks). He went on to say ***"Nanyamula meno ya Njobvu"*** (I am carrying elephant teeth).

2.7. According to another DNPW officer, the 1st appellant said ***"Nanyamula Minyanga"***(I am carrying tusks). A third DNPW officer testified that the 1st appellant said ***"Boss, ndine munzanu. Nanyamula minyanga"*** (Boss, I am your friend. I am carrying tusks).

2.8. The 1st appellant then opened the motor vehicle and showed them two bags that contained 16 pieces of cut ivory.

2.9. The appellants were apprehended and taken to the DNPW offices in Livingstone. A notice of seizure of

the ivory was issued and it was signed by the two appellants confirming that 53.8 Kilograms of Ivory had been seized from them.

2.10. In his defence, the 1st appellant denied being found with the ivory. He also denied saying that he was carrying ivory just before he was apprehended.

2.11. He said on the 20th of February 2017, he visited Kashitu Compound to pick up a female acquaintance. He decided to leave because she did not turn up.

2.12. As he was about to drive off, he was confronted by DNPW officers who shouted out that they were arresting him. When he lowered the window to find out why they were arresting him, they pepper sprayed his eyes.

2.13. They searched his motor vehicle and found nothing. They also searched his house and nothing was found there too.

2.14. The officers took him to their office where they searched his vehicle again and still found nothing. He was then detained at a police station.

2.15. The following morning, the Warden, a Mr. Zulu picked him from the police station. He knew him

because they had previously differed over a lady. He took him to their office where they showed him pieces of ivory they claimed were found on him.

2.16. The 2nd appellant's account of their apprehension was the same as that of the 1st appellant. He similarly denied the recovery of ivory from the motor vehicle in which they were when they were apprehended.

3. FINDINGS BY THE TRIAL MAGISTRATE

3.1. The trial Magistrate found that the evidence of the DNPW officers, on what transpired when they apprehended the appellants, was not credible because they contradicted each other on what the 1st appellant said at the time.

3.2. In addition, the trial Magistrate found that the fact that the 1st appellant had previously quarrelled with the Warden and that the appellants were pepper sprayed, raised doubt on the claim that the ivory was found in his motor vehicle.

3.3. The trial Magistrate also found that since the appellants were not able to see what was happening when the motor vehicle was pepper sprayed, it is

possible that DNPW officers could have planted the ivory in it.

3.4. He concluded that the prosecution had failed to prove that the appellants were found in possession of the ivory and acquitted them.

4. PROCEEDINGS IN THE HIGH COURT

4.1. Dissatisfied with the acquittal, the respondent appealed to the High Court.

4.2. Two grounds were advanced in support of that appeal. They were couched as follows:

(i) **The learned magistrate erred in law and fact when he acquitted the respondents on the ground that they did not possess the 53 kilograms of ivory which is a prohibited trophy; and**

(ii) **The trial court below misdirected himself when he held that the evidence of the defence was logical compared to the prosecution witnesses.**

4.3. In support of the 1st ground of appeal, reference was made to **The Penal Code's** definition of the term 'possession' and it was argued that since the ivory

was found in the appellants' motor vehicle, they should have been found to have been in possession of it.

4.4. Coming to the 2nd ground of appeal, it was argued that the trial Magistrate erred when he made assumptions that were not supported by the evidence.

4.5. First of all, the 1st appellant's claim that he was implicated because he differed with the Warden should not have been accepted because it was not corroborated. Neither was the girlfriend called.

4.6. Further, it was argued that the trial Magistrate's finding that someone else could have placed the ivory in the motor vehicle was not supported by the evidence.

4.7. The thrust of the appellants' case against the appeal was that it was not competent because it was on questions of fact. It was pointed out that **Section 321A of The Criminal Procedure Code** only allowed the Director of Public Prosecutions to appeal on points of law.

4.8. Further, the appeal set to assail findings of fact that were anchored on the credibility of a

witness, as assessed by the trial Magistrate. That was equally not tenable.

5. DECISION OF THE HIGH COURT ON APPEAL

5.1. On the basis of the holding in the case of the **Director of Public Prosecutions v. Ng'andu**[1], the Judge on appeal found that the appeal was competent because the respondent sought to assail findings of fact on the ground that they were not supported by the evidence.

5.2. The Judge on appeal then considered whether the appellants were in joint possession of the ivory. She opined that the trial Magistrate failed to resolve the question whether the ivory produced was recovered from the car.

5.3. She examined the testimony of DNPW officers as regards what the 1st appellant said when they apprehended him. She found that the trial Magistrate erred when he found that they contradicted each other.

5.4. The Judge on appeal also considered the implication of the pepper spraying of the motor

vehicle in which the appellants were, before their apprehension.

5.5. She concluded that it should not have been the basis for doubting the prosecution's case that ivory was recovered from the motor vehicle because the appellant's position was that no ivory was found in it when it was searched.

5.6. The Judge on appeal opined that there was no basis on which the trial Magistrate could have concluded that since the appellants were not able to see what happening after being pepper sprayed, someone else could have put the ivory in the motor vehicle.

5.7. On the whole, the Judge on appeal found that the trial Magistrate did not properly evaluate the evidence and made findings of fact that were not supported by the evidence.

5.8. He concentrated on the 1st appellant's claim that he had quarrelled with the Warden, which, in her view, was peripheral, ignoring the fact that the DNPW officers were in the area after receiving a tip off.

5.9. The Judge on appeal found that it was an odd coincidence, which was corroborative, that after the officers received information of the likelihood of there being ivory in the Kashitu area, when they got there, the appellants were found with ivory.

5.10. She set aside their acquittals and convicted both of them for being found in possession of 53.8 kilograms of ivory without lawful authority.

5.11. The appellants were each sentenced to 5 years imprisonment.

6. GROUNDS OF APPEAL BEFORE THE COURT OF APPEAL

6.1. Seven grounds have been advanced in support of this appeal.

6.2. However, having scrutinised the seven grounds of appeal and the arguments in their aid, it is our conclusion that they are all concerned with only two issues, that is:

(i) whether the Director of Public Prosecutions (DPP) can appeal against a finding of fact; and

(ii) whether an appellate court can reverse a trial court's finding of fact following that court's finding that a witness was not credible.

7. ARGUMENTS ON WHETHER THE DPP CAN APPEAL AGAINST A FINDING OF FACT

7.1. It was submitted on behalf of the appellants, that the respondent's appeal to the High Court, against the appellants' acquittals by the Subordinate Court, was incompetent because it was an appeal against findings of fact made by the trial Magistrate.

7.2. Counsel referred to **Section 321A of The Criminal Procedure Code** and pointed out that under that provision, which provision was used to launch the appeal to the High Court, the DPP can only appeal on a point of law.

7.3. It was also argued that going by the grounds of appeal to the High Court, the appeal did not raise points of law but was only concerned with questions of fact.

7.4. Counsel also pointed out that the principle set out in the case of **The Director of Public**

Prosecutions v. Ng'andu[1], that a finding of fact not supported by evidence is a question of law, was not applicable to this case.

7.5. He argued that in this case, the conclusions drawn by the trial Magistrate on the credibility of the witnesses, followed his assessment of their demeanour. Going by the decisions in **Malawo v. Bulk Carriers of Zambia Limited**[2] and **Mushemi v. The People**[3], an appellate court, which did not have the opportunity to observe such demeanour, is not in a position to determine that the evidence was or was not, credible.

8. RESPONSE TO ARGUMENTS ON WHETHER THE DPP CAN APPEAL AGAINST A FINDING OF FACT

8.1. In response to these arguments, it was submitted on behalf of the respondent that the Judge on appeal correctly found that the appeal was competent because both grounds of appeal dealt with points of law.

8.2. The first ground of appeal dealt with what amounts to "possession". **Section 4 of The Penal Code**

makes provision of when a person is said to be in possession.

8.3. Further, in the case of **Madubula v. The People**[4], the Supreme Court expounded on what amounts to possession in that provision.

8.4. Coming to the second ground of appeal, it was concerned with the credibility of witnesses which is both a point of law and fact.

8.5. This being the case, the threshold set by **Section 321(A) of The Penal Code**, for appeals by the DPP, were met. It was also argued that the holding in the case of **The Director of Public Prosecution v Ng'andu**[1], was applicable because the appeal rested on points of law anchored on findings of fact.

9. COURT'S CONSIDERATION AND DETERMINATION OF THE QUESTION WHETHER THE DPP CAN APPEAL AGAINST A FINDING OF FACT

9.1. **Section 321(A)(1) of The Criminal Procedure Code**, which deals with appeals by the DPP, reads as follows:

> **"If the Director of Public Prosecutions is dissatisfied with a judgment of a Subordinate Court as being erroneous in point of law, or as being in excess of jurisdiction, he may appeal against any**

such judgment to the High Court within fourteen days of the decision of the Subordinate Court"

9.2. From this provision, it is clear that the DPP can only appeal to the High Court against the decision of the Subordinate Court on a point of law or where the DPP contends that the trial Magistrate's decision was in excess of his jurisdiction. The DPP cannot appeal on a question of fact.

9.3. In many cases and especially in those cases where the grounds of appeal have been properly crafted, it is possible to determine on their face, that they are concerned with either a point of law or a question of fact.

9.4. However, the mere fact that a ground of appeal has the words "point of law" or "question of fact" in the text, does not necessarily mean that the ground of appeal is actually on a point of law or on a question of fact.

9.5. Most of the time, even with well drafted grounds of appeal, the question whether a ground of appeal is actually on a point of law, can only be decisively

determined after examining both the ground of appeal and the arguments in support.

9.6. This is because there are instances where arguments in support of a ground of appeal which has been presented as one being on point of law, actually show that what is being contested is a finding of fact.

9.7. As one examines whether a ground of appeal is on a point of law or on a question of fact, sight should not be lost of the holding in the case of **The Director of Public Prosecutions v. Ng'andu**, where it was held, *inter alia,* that:

> **"A finding of fact is a question of law on which the Director of Public Prosecutions can appeal under s. 12 (4) of the Supreme Court of Zambia Act 1973 only if it be alleged that it was made without any evidence or on a view of the facts which could not reasonably be entertained"**

9.8. In this case, the DPP's first ground of appeal before the High Court read as follows:

> **"The learned magistrate erred in law and fact when he acquitted the respondents on the ground that they did not possess the 53 kilograms of ivory which is a prohibited trophy"**

9.9. In support of that ground of appeal the arguments were that the trial Magistrate erred when he found that the appellants were not in possession of the ivory because the ivory was neither in their possession or custody.

9.10. It was also argued that both the *actus reus* and *mens rea* for possession were proved because the ivory was found in the motor vehicle. Further, that the trial Magistrate's finding that the ivory could have been placed in the motor vehicle by a third party was farfetched and a misapplication of the facts.

9.11. The second ground of appeal read as follows:

> **"The trial court below misdirected himself when he held that the evidence of the defence was logical compared to the prosecution witnesses"**

9.12. The arguments in support of the second ground of appeal were that the trial Magistrate erred when he concluded that since the appellants could not see what was going on when the motor vehicle was pepper sprayed, it is possible that someone else could have placed the ivory in it.

9.13. In addition, it was argued that the trial Magistrate erred when he decided to believe the

uncorroborated evidence of the appellants instead of the overwhelming prosecution evidence.

9.14. Although the first ground of appeal indicated that the trial Magistrate erred in "law and fact" it is apparent that the ground of appeal challenged the finding by the trial Magistrate that the appellants were not in possession of the ivory because someone else could have placed it in the motor vehicle when the appellants were pepper sprayed.

9.15. Going by the decision **The Director of Public Prosecutions v. Ng'andu**[1], an allegation that the trial court made a finding of fact based on a view of the facts which cannot reasonably be entertained, is actually a ground of appeal on a point of law.

9.16. It follows that the challenge in the first ground of appeal was actually on a point of law because the contention was that there were no evidence on which the trial Magistrate could have come to the conclusion that the ivory was placed in motor vehicle at the time it was pepper sprayed.

9.17. The second ground of appeal, which made no mention of the fact that the trial court erred on a

point of law, dealt with the decision of trial Magistrate to conclude that the prosecution evidence was not as logical as that of the defence.

9.18. It was argued that the trial Magistrate made wrong assumptions on the evidence that was before him, which made him conclude that the defence evidence was more credible than the prosecution evidence.

9.19. As was pointed out in relation to the first ground of appeal, an allegation that a finding of fact is based on a view of the facts which cannot reasonably be entertained, was held to be a point of law in the case **The Director of Public Prosecutions v. Ng'andu**[1].

9.20. This being the case, we equally find that the second ground of appeal was competent because it was contended that on a proper assessment of the evidence before him, the trial Magistrate would not have come to the conclusion that the prosecution evidence was not credible.

9.21. Although it is apparent that the grounds of appeal, in the appeal that was before the High Court

were poorly drawn, we find that the appeal was actually on points of law and not questions of fact.

9.22. The appeal was therefore competent and the High Court had the jurisdiction to hear it.

10. ARGUMENTS ON WHETHER AN APPELLATE COURT CAN REVERSE A FINDING OF FACT

10.1. Counsel for the appellant referred to the case of **The Attorney General v. Kakoma**[5] and submitted that it is within a trial court's right to make a finding of fact even where there is conflicting evidence, because such a court would have had the opportunity of seeing and hearing the witnesses give evidence.

10.2. Counsel then referred to the cases of **Malawo v. Bulk Carriers of Zambia Limited**[2], **The Attorney General v. Marcus Kampumba Achiume**[6] and **Communications Authority v. Vodacom Zambia Limited**[7], and pointed out that where such a finding is made, it can only be set aside by an appellate court if it is perverse or not supported by the evidence.

10.3. He proceeded to argue that the decision by the Judge on appeal to set aside the finding that the appellants could not see what happened after the

pepper spraying and that the ivory could have been placed into the motor vehicle at that point, was erroneous because the finding was supported by evidence.

10.4. There was evidence from the appellants that they could not see what was going on in the motor vehicle after the pepper spraying.

10.5. It was pointed out that it is possible that the appellants could have been carrying the ivory or that it was slipped into the motor vehicle during that period, but going by the decision in the case of **Dorothy Mutale and Another v. The People**[8], the court was required to draw an inference which was favourable to the appellant.

10.6. In this case, such inference being that the ivory was slipped into the motor vehicle soon after the pepper spraying.

10.7. That being the case, the trial Magistrate should not have been faulted for relying on the decision in **Saluwema v. The People**[9], and finding that it was probable that the ivory could have been put in the motor vehicle after the pepper spraying.

10.8. Counsel also submitted that there being a planned operation following a tip off, it was unusual that there was not even photographic evidence to prove that the ivory produced in court was found in the 1st appellant's motor vehicle.

10.9. In the same vein, counsel submitted that the Judge on appeal should not have downplayed the 1st appellant's claim that the ivory was planted on him because of his differences with the Warden.

10.10. He pointed out that senior officers like the Warden, rarely get involved in such investigations. But in this case, the picking up of the appellants from the police station, by such a senior officer raised suspicion.

10.11. It points to the fact that the 1st appellant's claim that the ivory was planted on him because there was a vendetta, was reasonably possible.

10.12. Finally, it was submitted that the Judge on appeal erred when she found that it was an odd coincidence, which was corroborative, that the officers received information of the likelihood of

there being ivory in the Kashitu area, and when they got there, the appellants were found with ivory.

10.13. Counsel referred to the case of **Ilunga Kalaba and John Masefu v. The People**[10], and submitted that in the face of the explanation of what they were doing in that area, the question of that odd coincidence being corroborative, did not arise.

11. ARGUMENTS IN RESPONSE TO THE QUESTION WHETHER AN APPELLATE COURT CAN REVERSE A FINDING OF FACT

11.1. In response to these arguments, it was submitted on behalf of the respondent that the Judge on appeal cannot be faulted for reversing the trial Magistrate's findings on the credibility of the prosecution witnesses.

11.2. The three witnesses substantially said the same thing on what the 1st appellant is said to have told them he was carrying in his motor vehicle when he was confronted.

11.3. It follows, that the finding by the trial Magistrate that their evidence was contradictory was perverse. It was submitted, on the basis of the decisions in **Malawo v. Bulk Carriers of Zambia**

Limited[2] and **The Attorney General v Marcus Kampumba Achiume**[6], that the Judge on appeal was on firm ground when she reversed the finding.

11.4. Coming to the argument that the Judge on appeal erred when she held that the pepper spraying should not have been a basis for concluding that someone else could have placed the ivory into the motor vehicle, it was submitted that the finding was on point.

11.5. Counsel submitted that such a finding would have been appropriate if the appellants' position was that even though the ivory was found in their motor vehicle, they did not know who put it there. But in this case, their position is that no ivory was found in the motor vehicle when they were apprehended.

11.6. Coming to the application of the principle in the case of **Saluwema v. The People**[9] in this case, counsel submitted that the Judge on appeal having correctly found that the trial Magistrate did not properly evaluate the evidence and as such drew wrong conclusions and made wrong findings of fact,

there was no basis on which that case would have been relied on.

11.7. Counsel also submitted that there was no evidence on which the trial Magistrate could have come to the conclusion that the Warden falsely incriminated the appellants because of a difference over a woman.

11.8. The said woman was not called to testify and the Judge on appeal cannot, in the circumstances, be faulted for dismissing the claim.

11.9. As regards there being an odd coincidence from the fact that the appellants were found with ivory after a report that there would be a person in that area with ivory, counsel submitted that the Judge on appeal was entitled to take that view.

11.10. Reference was made to the case of **James Mwango Phiri v. The People**[11] and it was submitted that a court is entitled to find explanations that are raised for the first time when an accused person is giving his defence, as an afterthought.

11.11. She also referred to the case of **Ilunga Kalaba and John Masefu v. The People**[10], and submitted that

since the appellant's explanation that they were in that area because of a woman could not reasonably have been true, they had, in effect, rendered no explanation for their presence in that area.

11.12. That being the case, the Judge on appeal was entitled to find that being found in the area was an odd coincidence because their presence was unexplained.

12. COURT'S CONSIDERATION AND DECISION ON THE SETTING ASIDE OF FINDINGS OF FACT BY AN APPELLATE COURT.

12.1. Before we deal with whether the approach taken by the Judge on appeal on the findings by the trial Magistrate was correct, it is necessary that we comment on the submissions on the effect of the failure by the prosecution to present photographs of the recovered ivory and the involvement of a senior officer in the investigation.

12.2. There is no evidence on record suggesting that the carrying of cameras is a requirement when wildlife offences are being investigated. Consequently, we find no basis for doubting the veracity of the testimonies of the prosecution

witnesses on the sole basis that no photographs were taken of the seizure of ivory from the appellants.

12.3. In any case, we are not aware of any law or rule of evidence that is to the effect that an account by a witness shall not be credible or will be rendered suspicious if photographic evidence is not presented to support it.

12.4. Having said that, there are instances where photographic evidence can be used to resolve contentious issues. Particularly in cases where such photographs were taken in the course of investigations. In this case, there is no evidence of any photographs having been taken during the investigations.

12.5. We will now deal with the submission that we should find the involvement of the Warden suspicious because ordinarily, the Warden does not get involved in such low-level investigations.

12.6. There is no evidence on the record to support the proposition that Wardens do not get involved in the type of investigations that led to the apprehension of the appellants. We are therefore

constrained from making an adverse finding on the prosecution evidence solely because the Warden was involved.

12.7. Reverting to the circumstances when an appellate court can set aside a finding of fact, the case of **Malawo v Bulk Carriers of Zambia Limited**[2], dealt with the options available to an appellate court when dealing with the credibility of witnesses. The Supreme Court, held as follows:

> **'Where questions of credibility are involved, an appellate court which has not had the advantage of seeing and hearing witnesses will not interfere with findings of fact made by the trial judge unless it is clearly shown that he has fallen into error.'**

12.8. Further, in the case of **Augustine Kapembwa v. Danny Maimbolwa and The Attorney-General**[12], the Supreme Court held that:

> **"The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses but in discounting such evidence the following principles should be followed:**
>
> **That:**
>
> **(a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or**

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

12.9. As regards whether an appellate court can make findings of fact, the holding in the case of **Kenmuir v Hattingh**[13], was that:

(i) An appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of fact if the findings were conclusions based on facts which were common cause or on items of real evidence, when the appellate court is in as good a position as the trial court.

(ii) Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the

trial judge unless it is clearly shown that he has fallen into error.

12.10. There were two conflicting accounts of what happened on the morning the appellants were apprehended.

12.11. The prosecution evidence which was supported by three witnesses was that the ivory was recovered from the motor vehicle in which the appellants were. In addition, the 1st appellant admitted that they were carrying ivory.

12.12. On the other hand, the defence evidence was that no ivory was recovered from the motor vehicle. They only saw the ivory at the DNPW offices later that day.

12.13. The trial Magistrate found the prosecution evidence was not credible because it was contradictory on what the 1st appellant said at the time the appellants were apprehended.

12.14. We have examined the evidence of the three witnesses and we do not find that it was contradictory. They were all agreed on the recovery of ivory from the motor vehicle and that the 1st appellant said he was carrying ivory.

12.15. We therefore find that the Judge on appeal was entitled to finding fault in the trial Magistrate's conclusion that the prosecution witnesses were not credible. This is because that finding was not anchored on the demeanour of the witnesses but the allegedly contradictory accounts that they gave.

12.16. Having made such a finding, the Judge on appeal was entitled to make findings of fact in line with the decision in **Kenmuir v Hattingh.**[13]

12.17. One of the issues she set to decide on, was how the ivory found itself in the motor vehicle.

12.18. Even though the appellants denied the presence of ivory in the motor vehicle when they were apprehended, the trial Magistrate acknowledged its presence.

12.19. He went on to consider how it found itself there and he concluded that it is possible that it could have been placed in there by a third party when the motor vehicle was pepper sprayed.

12.20. Both parties made reference to the cases of **Dorothy Mutale and Another v. The People**[8] and **Saluwema v. The People**[9].

12.21. In the case of **Dorothy Mutale and Another v. The People**[8], two persons were accused of trying to steal a motor vehicle belonging to the 1st appellant near a market in Kitwe. The appellants and two other men started beating the two. They placed the suspects in the 1st appellant's car and drove away with them.

12.22. Shortly afterwards, the deceased died from beatings meted out on him near the 1st appellant's residence on Bombesheni Road in Kitwe. Some witnesses claimed that when news of the death reached them, they went to Bombesheni Road and saw that the deceased was one of the suspects earlier beaten up by the appellants at the market. However, this evidence was discredited.

12.23. The issue that arose was the link between the body that was found near the 1st appellant's house and the suspect picked by the appellants from the market.

12.24. Allowing the appeal, Chief Justice Ngulube explained as follows:

> **"The case rested on the drawing of inferences. Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable**

to an accused if there is nothing in the case to exclude such inference. The circumstantial case in this appeal did not exclude the more favorable references.

It is, of course, quite possible and the suspicion in this regard is very strong that as Mr. Mukelabai suggested the incidents at the market and on Bombesheni Road were related. However, there is that lingering doubt on account of the various matters herein discussed and we are required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory"

12.25. In the case of **Saluwema v. The People**[9], the prosecution alleged that the appellant caused the death of the deceased by kicking him in the head at a party on the evening of 22nd August 1964.

12.26. There was evidence that after the fight was over, the deceased was seriously injured and he was eventually taken to hospital, where he died on the 30th August 1964, that is to say some eight days later.

12.27. There was evidence before the trial judge that there was a prior fight.

12.28. The issue that then arose was of the fatal injury having been inflicted during the course of the first fight. There was evidence that the deceased received

at least two fist blows in the first fight and one or both of them was of sufficient force to knock him down.

12.29. Blagden JA, delivering the judgment of the Court of Appeal, the forerunner of the current Supreme Court, indicated as follows:

> **"I have already referred to Dr Swain's evidence as to how the fatal blow might have been struck. She said:' I would think it unlikely that the blow would be caused by a fist'. [2] I do not consider that that observation rules out the reasonable possibility that this was how the fatal blow was inflicted. It may not be probable, but if it is only reasonably possible, as I think it is here, then there must be a reasonable doubt as to whether it was the kick administered by the appellant which caused the deceased's death. In these circumstances the prosecution cannot be said to have discharged the burden of proof upon it of proving the accused's guilt beyond reasonable doubt; and that is fatal to this conviction".**

12.30. We have set out the facts and holdings in the cases of **Saluwema v. The People**[9] and **Dorothy Mutale and Another v. The People**[8], to emphasise the point that it can only be said that two or more inferences can be drawn from a set of facts, where there is evidence supporting such inferences.

12.31. In this case, as was correctly concluded by the Judge on appeal, there was no evidence on which the trial Magistrate, could have concluded that the ivory could have been placed in the motor vehicle when it was pepper sprayed. This is the case because the appellants denied the recovery of the ivory from the motor vehicle after it was pepper sprayed.

12.32. With the denial, there was no evidence on which the trial Magistrate could have based his finding that it is possible that the ivory could have been placed in the motor vehicle at the time the appellants were not able to see what was happening following the pepper spraying.

12.33. It also follows, that the Judge on appeal rightly found that the holdings in the cases of **Saluwema v. The People**[9] and **Dorothy Mutale and Another v. The People**[8], could not have been deployed in aid of the appellants to this case.

12.34. We are satisfied that on the evidence that was before the trial Magistrate, the only conclusion that could have been drawn is that the ivory was in the motor vehicle with the full knowledge of the

appellants. This being the case, the Judge on appeal was entitled to find that they were in joint possession of the ivory.

13. VERDICT

13.1. We find no merit in this appeal and we dismiss it.

13.2. We uphold the convictions of both appellants for the offence of unlawful possession of a prescribed trophy contrary to **Section 130(2)(a)(b) of The Zambia Wildlife Act.**

13.3. We also uphold the sentences 5 years imprisonment with hard labour imposed on each one of them. The sentences will run from the date of this judgment.

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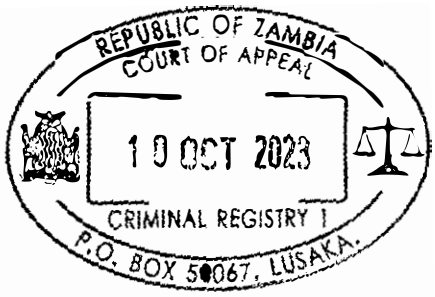
C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

.....

C.K. Makungu
COURT OF APPEAL JUDGE

.....

K. Muzenga
COURT OF APPEAL JUDGE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