

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO.90,91,92/2020
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)

BETWEEN:

ANDREW MUMBA

1ST APPELLANT

ALEX MWANANSHIKU

2ND APPELLANT

MUYA KASABI

3RD APPELLANT

AND

THE PEOPLE

RESPONDENT



Coram: Mchenga DJP, Majula and Muzenga, JJA

On: 17th January 2023 and 15th November 2023

For the Appellant: M.K. Liswaniso, Senior Legal Aid
Counsel, Legal Aid Board

For the Respondent: M. Hakasenke, Senior State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Mutambo and Others v. The People [1965] Z.R. 15
2. David Zulu v. The People [1977] Z.R. 151
3. Malimawa v. The People [1968] Z.R. 19

Legislation referred to:

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

INTRODUCTION

- [1] The appellants appeared before the High Court (Limbani J.), charged with the offence of murder contrary to **Section 200 of the Penal Code**.
- [2] They all denied the charge and the matter proceeded to trial.
- [3] At the end of the trial, they were all found guilty as charged, and condemned to suffer capital punishment.
- [4] They have all appealed against their convictions.

CASE BEFORE THE TRIAL JUDGE

- [5] On 15th December 2019, around 19:40 hours, Petronella Bwalya was shot dead at her house in Kalao Village, in Chinsali. No one saw the person who shot her.
- [6] As preparations for the funeral were underway, Bernard Bwalya, her grandson, received information from persons including Edgar Mbulo, that two weeks prior to the shooting, the 1st appellant had brought the 3rd appellant, a traditional healer, to divine at his house.
- [7] He gathered information that following the divination ceremony, hostility developed between 1st appellant and Petronella Bwalya because the 3rd appellant identified her as being a witch.

[8] Bernard Bwalya also gathered information that on the day his grandmother was shot, the 2nd appellant and Alfred Chiloshi, a suspect and a person who had threatened his grandmother with death, had spent a lot of time together. Alfred Chiloshi abandoned his homestead and fled soon after the shooting.

[9] Armed with that information, Bernard Bwalya organised members of the Community Crime Prevention Unit and launched a search for the appellants.

[10] Following their apprehension, they were placed in police custody.

[11] During their detention, the 2nd appellant volunteered to lead the police to where he had hidden a firearm that a subsequent ballistics examination found to be in good working order.

[12] The 1st and 2nd appellant, who were Petronella Bwalya's nephews, did not attend her funeral. In addition, the 2nd appellant also abandoned his homestead.

[13] The three appellants all denied committing the offence.

[14] In his defence, the 1st appellant denied having been part of the plot to murder Petronella Bwalya. He said

the 3rd appellant went to his house to administer herbal medicine on his son who was epileptic.

[15] During that treatment session, the 3rd appellant did not name anyone as being responsible for his son's illness.

[16] He maintained that even though he did not attend Petronella Bwalya's burial, he gathered for her funeral wake.

[17] In the case of the 2nd appellant, his defence was that on the day Petronella Bwalya was shot, he was in the bush hunting birds with the gun he surrendered to the police. He used to hide it in the bush because it was homemade and unlicensed.

[18] On his return, he found that Petronella Bwalya had died. A few days later he received information that his uncle had died in another village and thus he decided to go there. He denied abandoning his homestead.

[19] The 3rd appellant's defence was that he went to treat the 1st appellant's son in November 2019, and immediately returned to his village. He did not know anything about the death of Petronella Bwalya.

FINDINGS OF THE TRIAL COURT

[20] The trial Judge surmised that the case against the appellants was anchored on circumstantial evidence because no one saw them shoot Petronella Bwalya.

[21] He accepted the evidence that Petronella Bwalya was killed on suspicion of practicing witchcraft. He was of the view that the suspicions were instigated by the 3rd appellant's divination, when he visited the 1st appellant's homestead.

[22] He went on to note that it was odd or strange that the 1st and 2nd appellants, who were related to Petronella Bwalya, did not attend her burial. He deduced that this was because their consciences were troubled over what they had done.

[23] The trial Judge found that the recovery of the firearm which was hidden in the bush by the 2nd appellant, was an odd coincidence which was incriminating.

[24] In light of the above factors, the trial Judge concluded that the circumstantial evidence against the appellants was so cogent that the only inference that could be drawn on it was that the appellants murdered Petronella Bwalya.

GROUNDS OF APPEAL AND ARGUMENTS

[25] Three grounds have been advanced in support of this appeal, the thrust of which is that an inference that the appellants murdered Petronella Bwalya is not the only inference that could have been drawn on the evidence that was before the trial Judge.

[26] In a nutshell, Mrs. Liswaniso submitted that the bulk of the evidence on which the trial Judge drew the inference of guilt, was hearsay evidence.

[27] She referred to the case of **Mutambo and Others v. The People**¹ and submitted that while the trial Judge cannot be faulted for allowing Bernard Bwalya to recount how he went to look for the appellants after being told that they had accused his grandmother of being a witch, he should not have relied on that evidence to conclude that the allegations were true because the persons who made the allegations were not called to testify.

[28] She also submitted that the firearm recovered from the 2nd appellant was of no significance because the ballistics examination nor any other evidence, did not link it to the murder.

[29] Mrs. Liswaniso concluded with the submission that when the hearsay evidence is excluded, the standard set in the case on **David Zulu v. The People**² for a conviction being anchored on circumstantial evidence was not met.

[30] Mrs. Hakasenke, who appeared on behalf of the State did not and rightly so in our view, support the conviction.

CONSIDERATION OF APPEAL AND COURT'S DECISION

[31] In the case of **Malimawa v. The People**³ the court considered the evidential value of hearsay evidence. It was held that an out of court statement, by a third person who is not called as a witness, is not evidence of the facts that person states; unless the accused acknowledges the truth of what the third person said, such evidence must be disregarded altogether.

[32] The apprehension of all the appellants was in the main informed by information given to Bernard Bwalya by persons who were not called as witnesses.

[33] Those persons informed Bernard Bwalya that soon after the 1st appellant brought the 3rd appellant to divine over his son's illness, his grandmother was accused of being a witch.

[34] They also informed him that on the day his grandmother was shot, the 2nd appellant was seen in the company of one Alfred Chiloshi, a person who had threatened her with death.

[35] The evidence we have just referred to in the last two preceding paragraphs, was all hearsay and should not have been relied on when deciding the liability of the appellants.

[36] The only evidence that was before the trial Judge was that the 1st appellant brought the 3rd appellant to treat his sons and days later Petronella Bwalya was shot. The 1st and 2nd appellants who were her nephews did not attend her funeral. In addition, the 2nd appellant owned a firearm which he used to conceal in the bush and shifted from his house after the shooting.

[37] It is our view that an inference that the appellants murdered Petronella Bwalya is not the only inference that can be drawn from this evidence.

[38] The fact that the 2nd appellant owned a firearm that he used to conceal in the bush was of no evidential value because there was no evidence that linked it to the shooting.

[39] In any case, the 2nd appellant gave an explanation why he concealed the firearm in the bush. It was unregistered and in the circumstances, his explanation could reasonably have been true.

[40] As regards the 1st and 2nd appellants' failure to attend their aunt's funeral, with no other cogent evidence incriminating them, that failure at the most, only raises suspicion and nothing more.

[41] We agree with both Mrs. Liswaniso and Mrs. Hakasenke, that the threshold set in the case **David Zulu v. The People**² for a conviction anchored on circumstantial evidence was not met. An inference that the appellants murdered Petronella Bwalya, is not the only inference that could have been drawn on the evidence that was before the trial Judge.

[42] Consequently, we find the three appellants convictions to be unsafe.

VERDICT

[43] We find merit in the sole ground of appeal and we allow it.

[44] We set aside the convictions of all the three of them and quash their sentences.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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B.M. Majula
COURT OF APPEAL JUDGE



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K. Muzenga
COURT OF APPEAL JUDGE