

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/213/2010

BETWEEN:

THE PEOPLE

AND

MATEYO MUJIMAIZI JERUSALEM

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 20th day of November, 2012.

For the People: Ms. F. Nyirenda, State Advocate, Director of Public Prosecutions chambers.

For the Accused: E. B. Mwansa of Messrs EBM Chambers.

JUDGMENT

Cases referred to:

1. *Director of Public Prosecutions v Kilbourne* [1973] 1 ALL. E.R. 440.
2. *Makobane v The People* (1972) Z.R. 101.
3. *Chimbini v The People* (1973) Z.R. 191.
4. *Bwanausi v The People* (1976) Z.R. 103
5. *Zulu v The People* (1977) Z.R. 151.
6. *Mwanza and Others v The People* (1977) Z.R. 221.
7. *Phiri (E) v The People* (1978) Z.R. 79.
8. *Musupi v The People* (1978) Z.R. 271.
9. *Chibozu and Another v The People* (1981) Z.R. 28.
10. *Kaunda v The People* (1990-1992) Z.R. 215.
11. *Ngulube v The People* (2009) Z.R. 91.
12. *Nyambe v The People* SCZ Number 5 of 2011 (to be reported in the 2011 Zambia Law Reports).

Legislation referred to:

1. *Penal Code, cap 87, s. 200.*
2. *Criminal Procedure Code, cap. 88 s.191A.*

The accused; MateyoMujimaizijerulalem, stands charged of the murder of Bright Mweembaon 1st May, 2010, contrary to section 200 of the Penal Code. And I will continue to refer to him as the deceased.The prosecution led five witnesses to prove the charge. The first witness was Kennedy Chitumba, aged 32 years. I will continue to refer to him as PW1. PW1 recalled that on 1st April, 2010, he retired to bed around 22:00hours with his friend Bright Mweemba; the deceased.And Danny. During the course of the night, PW1 heard a knock on the door. And a person announced that he was a “police officer”.PW1 immediately opened the door. Outside were five persons who included the accused person. And is also popularly known as “jah-man”. PW1 was in the process of fastening his belt, when the accused grabbed the belt from him, and started whipping him with the belt. The accused used the same belt to later whip the deceasedrepeatedly.

PW1 asked the accused why he was beating them. The accused replied that he was searching for someone. Shortly afterwards, the accused stopped a vehicle. And informed the driver that he wanted assistance to transport some thieves. With the help of the driver, the accused bundled the deceasedinto the boot of the vehicle.

In bid to rescue the deceased,PW1 suggested to Danny that, they should remove him from the boot because he was apprehensive about why and where they intended to take him. PW1, together with Danny wrestled with the accused and the driver. And eventually succeeded in removing the deceased from the boot. Shortly afterwards, PW1 demanded the return of his belt. The accused refused to surrender the belt. PW1 capitulated, and urged thedeceased that they return to sleep.The deceasedspurned the suggestion,

and insisted on recovering the belt. The accused taunted the deceased to follow him; if he dared to recover the belt. The deceased rose to the challenge, and followed the accused. PW1 and others returned to their quarters. And resumed their sleep.

The following morning, PW1 reported for work. Later in the evening, he was informed by his aunt that the deceased was found early in the morning at the *Blue Water* dam tied with an electrical cable, and was on the verge of dying. Eventually, he died in the course of the morning.

The second prosecution witness was Esther Njovu. And I will continue to refer to her as PW2. PW2 recalled the events of 30th April, 2010. On the material day she was sleeping, when around 02:00 hours, she was awoken by a knock on the tenant's door. In response, the tenant replied that the person they were looking for was not in those quarters. And were advised to knock on the door of the next flat. Eventually the strangers knocked on his uncle's door, and announced that they were police officers. The door was opened. And she heard a person enquire about the whereabouts of his niece. At that point PW2 decided to step out of her quarters as well. PW2 eventually saw the five men who were knocking. Of the five persons, PW2 only recognized the accused person. In due course, PW2 witnessed the accused grab a belt from PW1, and strike him with it. Later the deceased intervened, and asked the accused why he was striking at PW1. In response, the accused began whipping the deceased with the belt.

Afterwards, the accused called for a taxi. And with the help of the taxi driver, the accused bundled the deceased in the boot. The deceased forced himself out of the boot. Soon after the deceased freed himself, he demanded for the return of PW1's belt. The accused refused to return the belt. And told the deceased that he would give him the belt where they were going.

Eventually, the deceased and the accused left together. And she returned to sleep.

The following morning PW2 was informed by her uncle that the deceased had been severely beaten, and was lying at *Blue Water* dam. When PW2 arrived at the dam, she found the deceased lying on the ground, and had the electrical cable removed from his hands. Whilst at the dam, PW2 observed that the deceased was swollen. And his hands appear to have been broken. His body was bruised. Apparently, from being dragged. And blood was oozing from his head. At that juncture, the deceased was breathing very faintly.

Shortly afterwards, PW2 rushed to the police station at Castle shopping mall. And informed the police officers that the deceased had been beaten severely. The police officers advised PW2 to arrange transport to collect the deceased. PW2 arranged the transport, and took the deceased to the police station at Castle shopping mall. Later, the police advised PW2 to take the deceased to the University Teaching Hospital (UTH). When transport was arranged to transport the deceased, PW2 did not accompany the deceased to UTH. In the meanwhile, he remained behind. And had a statement recorded from her by the police officer. Later in the evening, PW2 was informed that the deceased had passed on.

The third prosecution witness was "*Comrade Chulu*". I will continue to refer to him as PW3. PW3 recalled the events of 30th April, 2010. Essentially, PW3 repeated the testimony of PW1 and PW2. It is therefore unnecessary to recount the testimony.

The fourth prosecution witness was Joseph Mweemba. I will continue to refer to him as PW4. PW4 was a cousin to the deceased. PW4 recalled that on 1st May, 2010, he was informed by his aunt that the deceased had been severely beaten. And was admitted at UTH. The following day PW4 went to

UTH to visit the deceased. On arrival at UTH, PW4 was informed that the deceased had passed on, the previous day on 1st May, 2011.

On 6th May, 2010, PW4 went to the mortuary at UTH to identify the body of the deceased before the post-mortem was conducted.

The fifth prosecution witness was Detective Inspector Masiliso. He is based at Chawama Police Station, Lusaka. And I will continue to refer to him as PW5. PW5 recalled that on 1st May, 2010, he received a report of assault occasioning bodily harm, from PW2, and Pauline Mweemba. The duo reported the assault on behalf of the deceased who was lying unconscious at the *Blue Water* dam. PW5 advised the duo to bring the deceased to the police station. A few minutes later, the deceased was brought to the police station at Castle Shopping Mall. When the deceased was brought, PW5 observed that he was bleeding from the nose, ears, and the mouth. He also had blood clots on his head. And bruises on his body. Before he was taken to UTH, PW2 informed PW5 that she found him lying on the ground at *Blue Water* dam with his face upwards. And his hands were tied with an electric cable.

PW2 also informed PW5 that the previous day, the deceased was visited by the accused in the small hours of the night, in search of his niece; Mwenya. When the accused arrived at the deceased's quarters, he introduced himself as a "police officer". When the deceased opened the door, he retrieved a belt from PW1, and started whipping both PW1 and the deceased. Eventually, the deceased followed the accused in a bid to recover the belt. He never returned home. And was only discovered at the *Blue Water* dam the following day; on the verge of dying. And was later rushed to UTH, where he died. PW5 was taken to the scene of the crime by PW2. At the scene of the crime, PW5 observed that there was a lot of blood spilled on the ground. He

also discovered that the accused lived 50 metres away from the scene of the crime.

On 2nd May, 2010, PW2 informed PW5 that the deceased had passed on. Upon receipt of that information, PW5 opened a docket for murder. And proceeded to make arrangements for the post-mortem. PW5 attended the post-mortem.

On 6th May, 2010, PW5 received a report from Pauline Mweemba and Joseph Mweemba that they had spotted the accused at *Chitimba* Bar; near the scene of the crime. PW5, in the company of Inspector Mabukurushed to the Bar. When they got to the bar, they found the accused at Castle shopping mall. PW5 apprehended the accused, and took him to the police station. Later, the accused was transferred to Chawama police station, where he was detained.

The accused gave an account of his movements to PW5, on the night when the deceased was assaulted. Namely, that the accused was drinking beer at a bar in the company of his wife. Whilst he was drinking beer, the accused was joined by his niece by the name of Mwenya. Shortly afterwards, the accused niece disappeared. And the accused began searching for his niece. One of the patrons at the bar volunteered to assist the accused search for his niece. The accused was taken to two houses, including, the deceased quarters in search of his niece. But to no avail. After the accused failed to provide a satisfactory explanation relating to the death of the deceased, PW5 decided to charge the accused of the offence of murder. The accused denied the charge.

After the prosecution witnesses completed tendering their testimony, I formed the opinion that the prosecution had established a *prima facie* case against the accused. And accordingly, I put the accused person on his

defence. The accused opened his defence on 31st May, 2011. The accused recalled that he was arrested on the 1st May, 2010. At the material time he was at a bar, when he was approached by police officers. And later taken to Chawama Police Station, where he was detained with his friend by the name of Bartholomew Ngosa. He was detained for four days. During the detention, the accused was informed that he had beaten the deceased. In the course of the investigations, the accused was requested to sign a statement. The accused refused. But the police persisted that he signs the statement. Eventually, the accused capitulated. And signed the statement.

After a period of one month, the accused was taken to Criminal Investigations Department (CID) office within the police station where a bribe of K 6 million was demanded from him to enable him secure his freedom. The accused refused to pay the bribe, and continued to protest his innocence. But the relatives to Bartholomew Ngosa capitulated to the demand. And paid an unnamed officer the sum of K6 million. Upon paying that sum, Bartholomew Ngosa was released. The accused testified that had he capitulated to the demand, he would not have been in Court.

The accused impeached the testimony of PW5. And claimed that the distance between *Chitimba* Bar, and his house is a distance of about 100 metres. And also testified that the distance from his house to the *Blue Water* dam is about 250 metres. The accused also contended that PW2 lied when she claimed that she saw a person with dreadlock. And that she viewed that person regularly on the Zambia National Broadcasting Corporation (ZNBC) television. The accused maintained that he has never been featured on ZNBC television.

The accused also maintained that PW3 lied, when he claimed that he knew the accused. And also lied when he claimed that they used to drink beer together. The accused maintained that if PW3, and himself knew each other,

he would not have reported that he was the one who beat the deceased. Finally, the accused maintained that if PW3 knew him as he claimed, he would have approached him directly at his house, and challenged him that he had beaten the deceased.

On 3rd June, 2011, Mr. Mwansa, counsel for the accused elected to close the case for the defence, without having to call any witness(es).

On 23rd August, 2011, Ms. Nyirenda, counsel for the prosecution, filed written submissions into Court. After reciting, the evidence of PW1 to PW5, Ms. Nyirenda submitted that from the evidence before me, the prosecution has proved the case of murder against the accused person. Ms. Nyirenda argued as follows: that there is evidence on record from PW1, PW2, and PW3, that before the deceased followed the people that had come to their home, the deceased was in good health. There is also evidence on record that when the accused person and his friends went to the deceased's house, they were very violent. The prosecution witnesses testified that the accused struck the deceased several times with PW1's belt. Further, the accused, and his friend "*Bongo Bongo*", continued with the violence against the deceased by roughing him up, and bundling him in the boot of the car.

Ms. Nyirenda argued that although there is no direct evidence that the accused inflicted the fatal injuries, there is overwhelming circumstantial evidence that the accused and his friend who is at large, inflicted the fatal injuries. Ms. Nyirenda pointed out that the deceased person left his home in the accused company. And was the following morning discovered brutally beaten. Ms. Nyirenda submitted that the motive may be inferred from the beating of the deceased, and the attempt to bundle the deceased in the boot of the vehicle. Thus, Ms. Nyirenda maintained that on the basis of the evidence on record, the only conclusion that can be inferred on the facts of this case is that the accused murdered the deceased.

Ms. Nyirenda urged that I would be on firm ground to convict the accused for the murder because the circumstantial evidence points to the accused, and his friend who is at large. In aid of this submission, Ms. Nyirenda drew my attention to the case of *Chimbiniv The People (1973) Z.R. 191*, where the Court of Appeal stated at pages 192 - 193 that:

“Where the evidence against an accused person is purely circumstantial and his guilt is entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts.”

In this case, Ms. Nyirenda pressed that the accused person was violent when he went to the deceased's house. And the deceased followed the accused and his group in a bid to retrieve the belt, as well as to verify whether the accused and his friends were police officers. The following day, the deceased was discovered severely beaten. Thus, the only reasonable inference that can be made is that the accused continued being violent towards the deceased. And since the deceased was alone, he was severely beaten. And sustained several fatal injuries reflected in the post mortem report.

Ms. Nyirenda submitted that the circumstantial evidence before me has taken the case out of the realm of conjecture. And has attained such degree of cogency which permits only the inference of guilt on the part of the accused person. My attention was in this regard also drawn to the case of *Zulu v The People (1977) Z.R. 151*. Ms. Nyirenda submitted that although there is no burden on the accused to prove his innocence, it is notable that in his entire defence, he did not mention what he was doing on the night the prosecution witnesses testified that he beat up the deceased; the accused merely stated what happened when he was apprehended. The accused elected not to speak about the night when the deceased was beaten.

Ms. Nyirenda acknowledged that the key prosecution witnesses in this case are all related to the deceased. Ms. Nyirenda however urged me not to regard these witnesses, as witnesses with an interest to serve because they is no reason why they would all testify to falsehoods against the accused. In this regard, MsNyirenda relied on the case of *Musupi v The People (1978) Z.R. 27*, where it was stated at page 215 that:

“So far as we are aware in all the cases in which the matter has been discussed, has been careful to refer to “a witness with a possible interest” or “witness who may have a purpose of his own to serve.” And Lord Hailsham in Kilbourne (2) in the passage cited above used the expression, “where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence.” All these extracts make it clear that the critical consideration is whether the witness does not in fact have an interest or purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the particular circumstances of the case, may have a motive to give false evidence. Once in the circumstances of the case this is reasonably possible, or in the words of Lord Hailsham “can reasonably be suggested,” the danger of false implication is present, and must be excluded before a conviction can be held to be safe. One does not hold such witnesses to be accomplices; one approaches the evidence of witnesses in the same way as he approaches that of accomplices.”

MsNyirenda argued that in this particular case, the danger is not present because there is nothing in the evidence that would suggest that the prosecution witnesses would concoct the story against the accused person. Therefore, although the prosecution witnesses are all related to the deceased, there is nothing to suggest that they had the motive to falsely implicate the accused person in any way.

Lastly, Ms. Nyirenda submitted that the evidence of the accused should be disregarded for the following reasons: first, the accused failed to state what happened on the night the deceased was beaten. The accused only narrated about his arrest on 1st March, 2010. Second, the accused claimed that the day of his arrest, it was the first time that he drank beer. And to be at a bar.

It does not make sense that the accused started drinking beer the very day he was arrested. Third, it does not make sense that he would take his wife to drink, barely after a day she had severe stomach pains arising from her pregnancy. Fourth, the accused claimed that he was apprehended on 1st March, 2010, around 18:00 hours; before the deceased died. This was an afterthought because he did not have any defence. Finally, the accused claimed that he was framed by the police because he refused to pay the bribe of K 6million. When the accused testified, he did not refer to or mention the K 6million. In the circumstances, MsNyirenda urged me to convict the accused as charged.

On 9th December, 2011, Mr. Mwansa filed the submissions on behalf of the accused. Mr. Mwansa submitted that the prosecution must prove the charge of murder beyond reasonable doubt. If any doubt is entertained, it entitles the accused to an acquittal. Mr. Mwansa pointed out that on one hand, the prosecution called five witnesses in bid to prove that the accused was at the material time, at the deceased's house; beat the accused; the deceased followed the accused; and that the accused was known by one of the prosecution witnesses. On the other, the accused maintained that he was not at the deceased's house; that the deceased was not beaten by the accused and his friends; And that the deceased did not follow the accused. Mr. Mwansa submitted that the accused was framed.

In support of the preceding assertions, Mr. Mwansa advanced the following reasons. First, if the deceased had truly followed the accused, PW1, PW2, and PW3, could have followed the deceased in order to protect him. More so that they were all related to the deceased. And could therefore not let the deceased to follow the accused and his friends alone. Second, the reasons for following the accused and his friends do not make sense. That is, to retrieve the belt from the accused and to prove whether or not the accused and his friends were not police officers. This is so because the deceased was not the

owner of the belt; the owner of the belt is PW1. And the accused and his friends were not police officers.

Further, Mr Mwansa argued that the accused and his friends were not at the deceased house at the material time. In so contending, Mr. Mwansa advanced the following reasons. First, that PW3 testified that the deceased said he would follow the accused and his friends in order to prove that they were police officers. And yet PW3 testified that he knew that the accused and his friends were not police officers. Second, PW3 testified that the accused struck the deceased with a belt three times. And yet he did nothing to protect the deceased from the beating. Third, PW3 testified that it was late in the night. And the deceased followed the accused and his friends. But PW3 retired to sleep. Mr. Mwansa argued that this does not make sense because PW3 was expected to follow the accused and protect him. Fourth, PW3 testified that the following morning he went to check on the accused and to ascertain the whereabouts of his niece. Mr. Mwansa argued that this does not also make sense because PW3 should have instead concerned himself about the whereabouts of the deceased. Fifth, that PW2; a cousin to the deceased watched helplessly, as the accused beat the deceased. Mr. Mwansa argued that PW2 should have intervened. Lastly, Mr. Mwansa pointed out that none of the neighbours were called to aid the prosecution witnesses in containing the intrusion and attack by the accused and his friends.

Mr. Mwansa submitted that conversely, the accused should be believed for the following reasons. First, when he appeared in Court he did not wear the Rastafarian dreadlock. Second, his evidence was not shaken during cross-examination. And third he never escaped from Kuku compound after the alleged offence. Instead, he went for a drink at *Chitimba* bar. Fourth, the accused has been framed because he refused to pay the bribe in the sum of K6million.

Mr. Mwansa urged me to acquit the accused on the following grounds: First, because for the preceding reasons a reasonable doubt has been raised that the accused did murder the deceased. Second, all the prosecution witnesses, except the arresting officer were related to the deceased. And as such have an interest to serve. Mr. Mwansa submitted that there is a possibility that the prosecution witnesses may themselves have murdered the deceased. And that is the reason why they decided not to follow him in the night. Third, the accused was not identified at the police station, because no identification parade was conducted. Lastly, the medical report was read to the Court by the arresting officer, instead of a medical doctor who conducted the post-mortem.

I am indebted to counsel for their spirited submissions and arguments. In this case it is palpably clear that there is no direct evidence surrounding the death of the deceased; it is all circumstantial evidence. And is also evidence of witnesses who may be said to be "suspect". Therefore, before I consider the evidence in this case, I will comment briefly on the preceding subjects. In *Zulu v The People (1977) Z.R. 151*, in a judgment delivered by Chomba, J.S., the Supreme Court observed as follows: it is competent for Court to convict on the basis of circumstantial evidence, as it is to convict on any other types of admissible evidence. By the way circumstantial evidence is defined as evidence from which a judge may infer the existence of a fact in issue, but which does not prove the existence of the fact directly. (see *Nyambe v The People SCZ Number 5 of 2011*).

However, there is one weakness peculiar to circumstantial evidence; that weakness is that by its very nature, circumstantial evidence is not direct proof of a matter at issue but rather is proof of facts not in issue, but relevant to that fact in issue and from which an inference of the fact in issue may be drawn. In the same *Zulu* case (supra), in the course of the judgment,

the Supreme Court adverted to Professor Noke's; An Introduction to Evidence 2nd Edition at page 467, where he observed that:

"The possible defects in circumstantial evidence may Include not only those which occur in direct evidence such as falsehoods, bias or mistake on the part of witnesses, but also the effect of erroneous inference."

Thus in the *Zulu* case (supra) Chomba J.S. cautioned that 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. In order to feel safe to convict, Chomba J.S., went on, a trial 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 of an inference of guilt.

In order to appreciate the principles outlined in the *Zulu* case (supra), it is in my opinion important to recall the facts in the *Zulu* case (supra). The appellant was convicted of murder of a woman in the course of a sexual assault. The injuries found on the body suggested that she had struggled with the assailant. The evidence also established that the appellant and the deceased had been drinking beer together until about midnight. But between 06:00 hours and 07:00 hours, the next day, the deceased's partially undressed body was found. Later, the appellant was traced. And when arrested, was found to have scratches on the neck and the chest. The appellant explained in evidence that scratches were caused by flying pieces of iron at his place of work; an explanation which was not refuted.

The trial Court without evidence to support the finding, said that the appellant had protective clothing at work and therefore that the flying particles of iron could not penetrate such clothing; the trial Court consequently inferred that scratches on the appellant were sustained during the struggle with the deceased. In arriving at its decision in the *Zulu* case, (supra), the Supreme Court opined that while it accepted the trial Court's finding that the appellant was with the deceased until midnight on the

relevant date, it was by no means easy for the Supreme Court to agree with the inference that the appellant was the murderer. The Supreme Court noted that the time lag between midnight when the appellant was last seen with the deceased, and the discovery of the deceased body was at least six hours. In that time, the Supreme Court observed that the appellant might have parted with the deceased, and that while the deceased was alone on her way back home. She was attacked by unknown people. Thus the Supreme Court concluded that the circumstantial evidence received at trial did not succeed in taking the case out of the realm of conjecture. In a word, the Supreme Court did not feel safe to uphold the conviction of the trial Court; the conviction was quashed.

The principle laid down in the *Zulu* case (supra) was recently affirmed in the case of *Ngulube v The People (2009) Z.R. 91*. This was an appeal against the judgment of the High Court in which the trial judge convicted the appellant of the offence of murder and sentenced him to death. In the *Ngulube* case (supra), from the evidence of the prosecution and defence, it was not in dispute that on the 29th of December, 2002, the appellant and the deceased drank wine together. Although there were many people who participated in the wine, the evidence was that the appellant and the deceased were on their own and never mixed with other drinkers. It was also not in dispute that the three bottles of wine that the duo drunk were purchased by the appellant. From the evidence it also emerged that the appellant and the deceased used separate cups for drinking wine. On departure, the appellant and the deceased left together at the same time.

In a judgment delivered by Silomba, J.S., the Supreme Court posited at page 98, that the crucial question was whether it was the appellant who murdered the deceased. The Supreme Court noted that the evidence relied on was circumstantial; there was no direct evidence from any of the witnesses that the appellant was actually seen putting rogor in the cup of the deceased.

There was also no evidence that the cup contained poisonous substance. The Supreme Court opined that in any event such evidence would not have been easy to procure. The Supreme Court went on to hold that the circumstantial evidence in its entirety showed that it was the appellant who placed the poisonous rogor in the cup of the deceased. He was alone when the deceased went to the toilet. And, therefore he had the opportunity to place the rogor in the wine and cause harm to the deceased. The Supreme Court went on to observe that by putting the rogor; a life threatening substance into the wine of the deceased, the intent to kill the deceased was established by the prosecution. The Supreme Court, therefore, had no doubt that the circumstantial evidence was so clear as to take the case out of the realm of conjecture, leading to the only irresistible conclusion that it is the appellant who killed the deceased.

In this case, it is contended that all the prosecution witnesses apart from PW5; the arresting officer, were relatives of the deceased. And as such, they were witnesses with a possible interest of their own to serve; and could well have had a possible bias against the accused. (*See Kaunda v The People (1990-1992) Z.R. 215 at page 224*). In the case of *Musupi v The People (1978) Z.R. 271*, a judgment delivered by Baron, D.C.J., the Supreme Court made the following observations (at pages 272 - 275): the law relating to accomplices is but one aspect of a wide subject of the law relating to corroboration. By the way the word corroboration has no special technical meaning; by itself it means no more than evidence tending to confirm other evidence. (*See Director of Public Prosecutions v Kilbourne [1973] 1ALL E.R. 440*). Thus the Supreme Court pointed out in the *Musupi* case (*supra*) that the trend then was towards a less technical approach to what is corroboration. This approach was recently affirmed by the Supreme Court in *Kombe v The People (2009) Z.R. 282 at 285*, (per Mwanamwambwa, J.S.). And it was further observed in the *Musupicase* (*supra*) that while different kinds of cases

give rise to different kinds of dangers, the principles governing the proper approach to the evidence of suspect witnesses are the same.

To continue the narration in the *Musupi* case (supra), the Supreme Court recalled the observation it made in the case of *Phiri (E) v The People (1978) Z.R. 79*, that at the end of the day the question is whether the suspect evidence be it accomplice evidence of a complainant in a sexual case or evidence of identification, receives such support from the other evidence or circumstances of the case as to satisfy the trier of the fact that the danger inherent in that particular case of relying on that suspect evidence has been excluded; only then can conviction be said to be safe and satisfactory. Further in the *Musupi* case, (supra) the Supreme Court went on to draw a distinction between a witness with a purpose of his own to serve and an accomplice. The Supreme Court noted that an accomplice certainly may have such a purpose, but the converse is not true; a witness with a purpose of his own to serve is not necessarily an accomplice. Be that as it may, the Supreme Court observed that this is an irrelevant distinction, because the question in every case is whether the danger of relying on the evidence of the suspect witness has been excluded.

Citing the judgment of Lord Hailsham in *Director of Public Prosecution v Kilbourne* (supra), the Supreme Court observed in the *Musupicase* (supra) that the categories of suspect witnesses are not closed. And as such, the same principles must be applied to the approach to a witness with a possible bias such as a relative or an accomplice. The Supreme Court hastened to add that the description “suspect witness” does not necessarily connote possible dishonesty. The Supreme Court pointed out that one category of case recognized by Lord Hailsham as falling within the same principle, was identification cases, where the danger is not deliberate dishonest, but a honest mistake.

In the *Musupi* case (supra) the Supreme Court also seized the opportunity to comment on the tendency to use the expression ‘witness with an interest or (purpose) of his own to serve.’ The Supreme Court noted that this perhaps is simply a shorthand version of the proper formulation, but it carries with it the danger of losing sight of the real issue. The Supreme Court recalled that in *Machobane v The People (1972) Z.R. 101*, and all the cases in which the matter has been discussed, the Supreme Court has been careful to refer to “a witness with possible interest”, or “a witness who may have a purpose of his own to serve”. And the Supreme Court noted that Lord Hailsham in *Director of Public Prosecutions v Kilbourne*(supra) used the expression “where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence”

In the end, the Supreme Court observed that the preceding discourse demonstrates that the critical consideration is not whether the witness does in fact have an interest or purpose of his own to serve, but whether he is a witness who because of the category into which he falls or because of the particular circumstances of the case may have a motive to give false evidence. In this case, I therefore warn myself of the danger of false implication of the accused.

There is another matter that I wish to refer to; this is the submission by MrMwansa that the post mortem report in this case was not tendered in evidence by a medical doctor. And, therefore, I should not rely on it. Section 191A of the Criminal Procedure Code enacts as follows:

“191 (1) The contents of any document purporting to be a report under the hand of a medical officer employed in any criminal proceedings shall be admitted in evidence in such proceedings to prove matters therein provide that:-

- (i) The Court in which any such report is adduced in evidence may in its discretion cause the medical officer to be summoned to give oral evidence in such proceedings or may cause written interrogatories*

- approved by the Court to be submitted to him for reply and such interrogatories and reply thereto purporting to be a reply from such person shall likewise be admissible in evidence in such proceedings.”*
- (ii) *At the request of the accused made not less than seven days before the trial, such witness shall be summoned to give oral evidence.”*

Section 191 A of the Criminal Procedure Code was subject of interpretation by the Supreme Court in *Chibozu and Another v The People (1981) Z.R. 28*. The facts in *Chibozu* (supra), were that the appellants, father and son respectively were convicted of the murder of the deceased. A post mortem report under the hand of a Government medical officer who was not called a witness was produced in evidence under the provisions of section 191 A of the Criminal Procedure Code referred to above. On an appeal, in a judgment delivered by Cullinan, J.S., the Supreme Court observed at page 32 that the effect of section 191 A is that the report of a medical officer employed in the public service shall be admitted in evidence “to prove” the contents. The Supreme Court went on to hold that the section does not state that the report shall necessarily be admitted as proof conclusive of its contents. The Supreme Court noted that no doubt, the legislature specifically provided for the summoning of the medical officer when either party or indeed the Court may summon him as a witness in any event, in the face of an inclusive, as much as an involved or vague report. The Supreme Court also pointed out that usually the contents of the medical report will in the least require elucidating, a point, which was stressed by Baron D.C.J. in *Mwanza and Others v The People (1977) Z.R. 221*, at page 222, as follows:

“Neither the trial Court nor this Court could say from this statement of facts (containing a paraphrase of a post mortem report) precisely what was the nature or the severity of the injuries inflicted on the deceased. We point out to those responsible for prosecutions that this information is essential to a proper consideration of the question of sentence, and may in some cases be essential on the question of verdict. There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require explanation not only of the terms used but also of the conclusions to be drawn from the facts and opinions stated in the report. It

is, therefore, highly desirable, save perhaps in the simplest cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in Court; certainly the Doctor should have been called in the present case."

The point about medical reports is that it must only be in the "simplest cases" that a judge in the exercise of his discretion under section 191 A would decide not to call the medical officer. On the facts of this case, the critical issue that falls to be determined is not in my opinion the nature of severity of the injuries inflicted on the deceased. But rather who caused the fatal injuries. Hence, I did not consider it necessary to exercise my discretion under section 191A to summon the medical officer.

I will now pass to consider the evidence relating to the death of the accused. In this case it is palpably clear that the evidence relied on by the prosecution is entirely circumstantial evidence. That is, there is no direct proof that the accused committed the murder in question. Notwithstanding, MsNyirenda urged and in fact, pressed, that there is overwhelming circumstantial evidence that the accused and his friend who is at large inflicted the fatal injuries. I must state that whilst circumstantial evidence can be powerful, as demonstrated by the *Ngulube case* (supra) referred to above, it must be examined and applied with utmost circumspection. The Court must always consider whether it is sufficiently reliable to prove the guilt of the accused person. It is important also to recall that where the evidence against the accused person is purely circumstantial, and his guilt is entirely a matter of inferences, an inference of guilt may not be drawn, unless it is the only inference which can reasonably be drawn from the facts. (*see also Bwanausi v The People (1976) Z.R. 103*).

In this case, the deceased and all the prosecution witnesses, save for the arresting officer, PW5, were awoken at about 02:00 hours on the fateful day. After the scuffle referred to above, the accused, his friends and the

deceased, retreated from the scene of the scuffle and retired to sleep. And about five to six hours later, the deceased was discovered at the *Blue Water Dam*, his hands tied by an electrical cable, bruised and severely beaten. He was in fact on the verge of dying. In the circumstances, I have been urged to draw the inference that it is the accused that killed the deceased.

I am not prepared to make this inference because it is not the only inference, which can reasonably be drawn from these facts. It is quite possible that the accused may have parted with the deceased, and while the deceased was alone he could have been attacked by unknown people. I am not therefore satisfied that the circumstantial evidence in this matter has taken the case out of the realm of conjecture. I, therefore, do not feel safe to convict the accused of the offence of murder. I accordingly acquit him.

Dr. P Matibini, SC
High Court Judge