

IN THE HIGH COURT FOR ZAMBIA  
HOLDEN AT KASAMA  
(Criminal Jurisdiction)

HWS/47/2017

THE PEOPLE

V

CHARLES SINKALA



Before the Honourable Mr. Justice Davies C. Mumba in Open Court on 6<sup>th</sup> December, 2017.

For the State: Mr. Patrick Mutale, Deputy Chief State Advocate  
Mr. M.C. Chipawa, State Advocate

For the convict: Mr. K. Katazo, Ag. Senior State Advocate

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### JUDGMENT ON REVISION

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#### Cases referred to:

1. Kapya Kandeke v The People (2010) 3Z.R. 292 at 294
2. Kambafwile v The People (1972) Z.R. 313 at 314 (reprint)
3. Muroso v The People (2004) Z.R. 207
4. The People v Mailosi Simwaba (1979) Z.R. 80 (reprint)

#### Legislation referred to:

1. The Penal Code, Cap. 87 - s. 328(1) (a)
2. The Criminal Procedure Code, Cap. 88 - s. 217 (1)

**CHARLES SINKALA** was convicted of the offence of arson, contrary to section 328(1)(a) of the Penal Code, Chapter 87 of the Laws of Zambia, as amended by Act No. 17 of 2007. The particulars of the offence were that the Convict on 6<sup>th</sup> July, 2016 at Isoka in the Isoka district of the Muchinga Province of the Republic of Zambia, wilfully and unlawfully, did set fire to the house of **NAMBELA GRACE** and destroyed property valued at K21,131.00.

As the trial Magistrate lacked jurisdiction to impose the mandatory minimum sentence of ten years, the case was remitted to the High Court for sentencing pursuant to section 217(1) of the Criminal Procedure Code, Cap. 88 of the Laws of Zambia.

Before I pass sentence, I must satisfy myself that the relevant legal and procedural provisions were observed by the trial Court.

The offence of arson is provided for in section 328(1) of the Penal Code, Cap. 87, as amended by Act No. 17 of 2007. The said section 328(1) enacts as follows (only the relevant part is quoted):

**“328.(1) Any person who wilfully and unlawfully sets fire to -  
(a) Any building or structure whatever, whether completed or not; ..... is guilty of a felony and is liable, on conviction, to imprisonment for a term of not less than ten years and may be liable to imprisonment for life.”**

Therefore, at trial, the prosecution had the duty to prove the essential ingredients of the offence which are that: the convict wilfully; and unlawfully; set fire to the house of NAMBELA GRACE.

At trial, the prosecution called three witnesses in support of their charge.

I have considered the evidence in the record of proceedings and the lower Court's judgment. I found it unnecessary to reproduce all the evidence.

It appears to me that the evidence on the record of the Court differs in material aspects from the evidence included in the judgment. I will merely give some examples. The first example is that, PW1 testified that:

**"..... the accused house was ablaze. We found the accused trying to remove the lowing from the house. The accused beat me up as the complainant was going back to the house ... In passion of anger he also burnt my house using stairs from his house."**

The trial Magistrate in the judgment of the Court in reference to PW1 writes:

**"So she woke up to see what was happening and she found him trying to put out the fire and others removing goods from the house. She was standing at a distance. The accused began to accuse the prosecutrix of burning his house, so he started beating her up in the process he got storms of fire and also set the prosecutrix's house on fire."**

The first part of the evidence quoted from the record appears to me unintelligible. In the judgment, the trial Magistrate attempted to clarify the evidence and to make it intelligible. This approach was wrong.

The second example is that, the record shows: **"Accused sworn statement without a witness, DW1 sworn on bible in Namwanga....."** on the other hand, the judgment of the Court shows that: **"The accused chose to make an unsworn statement but called no witness."**

These discrepancies make it difficult for me to follow the evidence of the trial Court, and to make good sense and logic out of it. It

should be noted that the judgment of the trial court cannot clarify the unintelligible evidence on the record of the Court. It should be *vice versa*. Further, the record should not only be intelligible to the trial Magistrate but to the appellate Court as well. Whether the findings contained in that judgment were based on the evidence in the record of proceedings is doubtful. I should point out that the summarised evidence should not lose meaning or acquire new meaning which is not based on the evidence on record. There should be no unwarranted amplification or distortion of the evidence at all.

Finally, the trial Magistrate concluded that:

**"The State and the prosecutrix has convinced me that the accused is the person who set the house on fire as the defense witness has failed to make a factual and logical rebuttle to the allegation and has also failed to call witnesses to concur with him about the truth of the case at hand."** (Underlining mine for emphasis)

Such a conclusion was a wrong approach and a misdirection on the part of the trial Court; because it amounts to shifting the burden of proof on the accused (**See the case of *Kapya Kandeke v The People*<sup>1</sup>**). The correct position at law is that the burden of proof lies with the prosecution; and the standard of proof is beyond all reasonable doubt. The accused bears no burden to prove his innocence. In the case of ***Kambafwile v The People*<sup>2</sup>**, Chomba, J, as he then was, observed at page 314 that:

**"It is trite law that in a criminal prosecution when a prisoner pleads not guilty he thereby puts the prosecution to prove all the essential ingredients of the charge. Such proof should be beyond all reasonable doubt. In my experience, I have formed**

the impression that although many Magistrates initially direct themselves correctly as to the burden of proof, they do not later apply that rigorous test to the facts presented before them by way of evidence."

Further, in the case of **Murono v The People**<sup>3</sup>, it was held that:

"In Criminal cases, the rule is that the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to the end on the prosecution. The standard of proof is high."

In the present case, the trial Magistrate erroneously attempted to shift that burden to the accused forgetting that he would have as well elected to remain silent. The question is had the accused elected to remain silent would the trial Court have convicted him on the available evidence offered by the prosecution?

Because of the trial Magistrate's approach, it is my considered view that less weight was attached to the accused's evidence. Hence the trial Magistrate did not evaluate the defence evidence to be satisfied that there were no discernible reasons for the complainant to falsely implicate the accused (his half-brother) in the crime or whether the fire could have been accidental since the two were neighbours; and other circumstances.

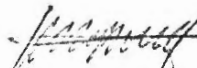
Before I conclude, let me state that I had the opportunity to read the case of the **People v Mailosi Siamwaba**<sup>4</sup> cited by the trial Magistrate. Although the accused in the case of *Siamwaba*<sup>4</sup> was charged with arson and convicted on his own plea of guilty; I found the case to be inappropriate and, therefore, inapplicable to

the facts of the present case. The case of *Siamwaba*<sup>4</sup> principally dealt with the issue of the Legal Aid Certificate; the right to refuse or dispense with it by the accused; and the duty of the Court to explain the accused's right in that regard. The present case is strictly dealing with the offence of arson where the accused appeared in person and nothing to do with the grant of legal aid certificate.

I find nothing in common between the two cases. In the circumstances, it is advisable that the trial Magistrates find time to read the cases they rely on or propose to cite as their authorities and to look for the *ratio decindi* of the cases.

Having considered all the circumstances of this case, I find that it is unsafe for me to uphold the conviction. Therefore, the conviction is hereby quashed and the accused acquitted. He is set at liberty forthwith.

Delivered in open Court at Kasama this 6<sup>th</sup> day of December, 2017.

  
Davies C. Mumba  
HIGH COURT JUDGE

