IN THE HIGH COURT FOR ZAMBIA **2SPC/209/2016**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

JEPHIAS MOYO MUSEBE

DAVID CHIKASHA

VS

THE PEOPLE

Before the Honourable Mr. Justice M.D Bowa in Open Court on 14th of February 2020.

For the Appellant: Mr. Y Daka of George Kunda and Company
For the State: Mr. M.C Chipawa State Advocate NPA

JUDGMENT

Cases referred to:

1. *Masefu v the people ZR 1981*
2. *Rodgers Kunda vs. the People Appeal 81 of 2017 SCZ*
3. *David Zulu vs. the People (1977) ZR 151.*
4. *Kombe vs. the People 2009 ZR 28 L*
5. *and Ilunga Kalaba and John Masefu 1981 ZR 102.*
6. *Steven Mushokwe v the People SCZ No 81 of 2014*
7. *Chikuta and the State H/344/82 (unreported)*
8. *In Phillip Mhango v Dorothy Ngulube and Others 1983 ZR 62*
9. *Zulu v Avondale Housing Project (1982) ZR 172*
10. *Kapembwa Maimbulwa & Another v The People 1982 ZR 127*

This is an appeal against conviction and sentence from a decision of the Subordinate Court of the 1st class in Lusaka. The background to the appeal is that the accused were jointly charged with one count of stock theft contrary to section 272 and 275 (2) of the Penal Code Chap 87 of the Laws of Zambia.

The particulars of the offence alleged that the accused in September 2016 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together with an unknown person did steal 3 Oxen valued at K18, 000 the property of Mr. Alex Hadebe.The court proceeded to convict both accused persons and sentenced them to 5 years imprisonment with hard labour.

Dissatisfied with the court's decision, the Appellants filed a notice of appeal dated 1st March 2018 advancing the following grounds of appeal.

"*1. That the lower court erred in law and in fact by convicting the Appellant on uncorroborated evidence. That based on shoe protector aligning the actual shoe and a photo later taken of the scene.*

2. *That the testimony of the arresting officer was discredited for this for his failure to apply the scientific power if speed added with water forms the exact footprint to liken to the actual shoe.*
3. *That identity was done during night time and dangers of mistaken identity are so high not to withstand the reliability of the old age sight and the brightness of the two torches.*
4. *That the distance to identity the Applicant at night at the scene is equally crucial and failure to take photo for the other shoe of the other side for corroboration.*
5. *More grounds to follow after the case record."*

At the hearing, learned counsel for the Appellants Mr. Daka, submitted that he would be placing reliance on the Appellant's heads of arguments dated 26th of February 2019. He also relied on the submissions filed in the lower court at case to answer stage dated 14th August 2017 and submissions in support of the appeal dated 12th February 2018.

In augmenting the filed submissions counsel drew the court's attention to 2 substantive arguments. He submitted firstly, that the record would show that in the lower court's judgment at page J12

and lines 13-17 the court agreed with the defence that there was no direct evidence connecting both accused to the offence. In this regard, that the court relied on circumstantial evidence in arriving at the conviction being appealed against. That the 2 circumstances in particular, were firstly the evidence of PW2 and PW3 to the effect that the Appellants were allegedly seen around 03:00 hours in the morning loading meat onto a canter. I was invited to consider that this was against the background of evidence on the record showing that the Appellants are sober character and do not consume alcoholic drinks.

Further that PW3 is a neighbourhood watch man and the place the Applicants were allegedly seen was a few meters from Molisa market which has a neighbourhood watch office. The behaviour of the witnesses was thus not reasonable and the possibility of concoction was high considering the reaction from them. He contended that if they had truly seen the Appellants loading the meat they would have reacted appropriately presumably by reporting the matter to that office. However, that the trial court

found that the prosecution witnesses were telling the truth whereas the Appellants position was always that this was a concocted story.

He submitted further that when the 2 witnesses were asked the clothes the Appellants wore on the night, it was surprising that they were categorically able to state what the lower apparel was but not so forthcoming for the upper clothing. Further that the photographic evidence before court showed that the Appellants were wearing shorts without shirts after their arrest. Counsel therefore submitted that the Appellants contention was that the identification was based on the photographs.

He submitted further that the medical evidence presented by the Appellants conclusively shows that they were beaten by known people that included some prosecution witnesses. He submitted therefore that the court should not have relied on the evidence of the prosecution witnesses.

Counsel Daka submitted further, that the court erred by not accepting the evidence of alibi which was led by the Appellants. That the arresting officer acknowledged he did not follow up the alibi presented which amounted to a dereliction of duty that should

have been resolved in favour of the Appellants. Regarding the evidence of the shoe print, it was the Appellants contention that the court erred by not considering the evidence of PW5 the headman, whose evidence contradicted that of the complainant on the prints. In particular that the complainant stated that he had preserved the shoe print by covering it with a basin. However, that the headman who was the second person to go to the kraal stated he did not find any basin in the Kraal.

Counsel argued that considering the 1st Appellant as owner of the shoe was not taken to the Kraal, coupled with the raining and muddy circumstances of the day, the reliability of the photographic evidence was not sufficient to have warranted the Appellants conviction. He urged the court to uphold the appeal and to quash the conviction of the lower court.

Counsel for the Respondent Mr. Chipawa in response submitted that the State would rely on the Respondent's heads of arguments filed on 15th of February 2019. He supported both conviction and sentence and submitted that both were anchored on the lower court's evaluation of the facts and law.

His response did not follow the manner of presentation by counsel for the Appellant. I will therefore bring out the arguments as they were presented. On the question of alibi counsel argued that the record does indeed show that the police did not investigate the alibi. However that at J13-J14, the court sufficiently dealt with the issue of the alibi. The court relied on the case of ***Masefu v the People***[1] in which it was held that where in looking at a raised alibi the police do not follow up or disprove it, other evidence available can be considered which discounts the alibi.

Counsel also referred me to the case of ***Rodgers Kunda vs. the People***[2] to argue that an accused person must cross examine the veracity of evidence that contradicts their version. That in this case there was evidence of a confession statement that went unchallenged on the record. Further that there was also evidence of leading that went unchallenged on the record.

It was the State's submission that it did not accept the evidence was exclusively circumstantial as argued. It was submitted further that in any event, there was no law that precludes the court from finding an accused person guilty based on circumstantial evidence.

I was referred to the case of ***David Zulu vs. the People***[3] as the celebrated authority over this proposition.

Mr. Chipawa submitted that in the present case, there was other evidence such as odd coincidences based on the conduct of the Appellants at the time of their apprehension as well as items found on the accused. Counsel cited an example the fact that the 1st Appellant had shoes that had footprints matching the sole found at the Kraal. Secondly that the 2nd Appellant was wearing gum boots and witnesses had testified finding gum boot prints at the scene. On odd coincidences, counsel referred me to the authority of ***Kombe vs. the People***[4] ***and Ilunga Kalaba and John Masefu***[5]. It was submitted that all this also went to negative the alibi.

On the question of the identification of the Appellants, counsel contended that evidence before court showed that this was based on recognition as opposed to first time identification. That the evidence of PW2 and PW3 was to the effect that they knew the Appellants and therefore the issue of mistaken identification could not have arisen. In addition that the Appellants themselves admitted knowing the prosecution witnesses. Counsel referred the

court to the case of ***Steven Mushokwe v the People***[6] in which the Supreme Court addressed the issue of the weight of evidence of recognition as opposed to first time identification.

It was argued further that the Appellants had not advanced any authority or basis for concluding that the witnesses that identified the Appellants could have had on interest to serve in this case. That it is not enough to merely aver that a witness has an interest to serve without showing what that interest is and how it may prejudice the Appellants.

On the question of credibility of the witness, it was submitted that this was a matter for the trial court as it is the court that had the chance to observe the demeanour of the witnesses. Counsel prayed that the court dismisses the appeal and uphold the lower Court findings of guilt, the conviction, and sentence accordingly.

In response Mr. Daka submitted that his earlier submissions in the court below sufficiently addressed the issue of the alleged confession. He argued further that the evidence of leading would have been acceptable if the witnesses did not know the place where the remains of the cattle were found. That all evidence to the

contrary, PW1 stated that the scene where the cattle was found was 1 kilometer from his farm whereas the headman confirmed that the place is at the boundary of the complainant's farm. That the evidence of the 1st Appellant supported by the medical report on a balance of probability should have been resolved in his favour this is as it relates to the leading and fact that he was assaulted.

Further in response to the submission on the gum boots, counsel argued that no documentary evidence was brought in the form of a picture of the boot or the gum boot itself which the Appellant allegedly wore.

On the issue of possible concoction, counsel argued that like sexual offences, it was necessary for the complainant to have reported the alleged incident in order to be held a reliable witness. I was referred to the case of ***Chikuta and the State***[7] a Zimbabwean decision in support of this proposition. He prayed that the appeal be allowed accordingly.

I have carefully considered the appeal and the arguments submitted by counsel. The first thing I wish to immediately register is my dismay that counsel for the Appellants did not substitute the

grounds of appeal in order for the court to clearly discern what is being contended. It is clear to see that the grounds were submitted before counsel was retained. Having been retained, it becomes the duty of the lawyer as officer of the court to ensure he/she assists the court in fashioning grounds of appeal that can be followed by the court.

That said, my assessment of the Appellants appeal based on arguments presented is that they question the courts findings of fact in the wake of evidence before it. The Appellants position can be summed up to be the that the court erred in convicting on the circumstantial evidence on record as there was no direct evidence pointing to the accused and that there was unreliable identification evidence; Secondly that the key prosecution witnesses credibility should have been brought into question on account of a grudge held against the Appellants and their conduct when they allegedly saw people loading meat and failed to report the matter to the neighbourhood watch office nearby.

Also raised as an issue was the apparent contradiction of evidence on record by prosecution witnesses on the footprint in the Krall. A

further argument raised was the courts apparent failure to deal with the raised alibi at trial.

I remind myself that it is trite that an appellant court may not easily disturb or temper with trial courts findings of fact. ***In Phillip Mhango v Dorothy Ngulube and Others***[8] the Supreme Court reiterated its holding in the case of ***Zulu v Avondale Housing Project***[9] in which the court observed the following:

"Before this court can reverse findings of fact made by a trial judge, we should have to be satisfied that the findings in questions were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make."

In ***Kapembwa Maimbulwa & Another v The People***[10] the Supreme Court laid down guiding principles that an appellant court must follow before it can interfere with the finding of fact by a trial court these include that:

"(a) By reason of some non-direction or misdirection 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 witness."

I have combed through the record and the court's judgment. The trial court agreed with the defence that there was no direct evidence implicating the accused. The learned Magistrate however accepted the evidence of the identity of the persons seen loading the meat he had concluded was stolen at 03:00 hours on the morning in question. The court reasoned that the Appellants were properly identified based on recognition as the Appellants and witnesses alike were well known to each other. The court ruled out the danger or possibility of mistaken identity and in so finding relied on the supporting evidence of shoe print resembling the shoes found with A1 and presence of a shoe protector. At J13 the court observed that:

"I must mention here that in this area and dispensation, a shoe protector is a very rare phenomenon to be found on a pair of shoes. It suffices to mention that it is quite an odd coincidence that a shoe print found at the kraal shows a shoe protector and the pair of shoe found on the accused whether he was carrying in the plastic or was wearing also had a shoe protector."

He thus ruled out the danger of mistaken identity on that premise.

I am further satisfied that the court did deal with the issue of possible concoction and the raised alibi. He in particular made a finding of fact that the issue of the prosecution witnesses having a grudge against the Appellants was a made up story as it was not raised in cross examination. At J14 the court went further to find that no question was raised to the police on the alleged alibi and dismissed the defence.

The court went further and stated that even assuming the issue was raised and the police failed to follow up the alibi, there was sufficient evidence to counter the alibi. The court thus made a specific finding of fact that the Appellants had lied about the alibis. The court also considered that when A1 saw the mob approaching

him, he lifted his hands in apparent submission and led the group to where the cattle was slaughtered which was a sign of his culpability.

I further take note from the evidence that the persons led were not persons in authority requiring any adherence to the Judges' rules. Therefore the court was perfectly in order to accept this evidence in arriving at its decision. The argument that the area where the cows were slaughtered was already known to the prosecution witnesses is misplaced. General knowledge of geographical area is not the same as pointing out a precise place where a crime was committed. I would dismiss the Appellants argument on this limb accordingly.

I would further disagree with the test and comparison made by the defence to assess the prosecution's witness's credibility. The defence suggested that like in sexual offences, the failure to raise an early complaint to the neihbourhood watch should have signaled questionable credibility in this case. There was no obligation on the part of PW2 and PW3 to do so. It was 3 am in the morning and once alerted by their neighbour of the missing cattle later the same morning, the witnesses fully co-operated and their efforts led to the

apprehension of the Appellants. I cannot fault the trial court for its findings in this case that in any event had the opportunity of viewing the demeanour of the witnesses.

I do not consider that his findings were perverse or made in the absence of any relevant evidence or that perhaps there was a misapprehension of the facts or conclusion based on a view of the facts which could not reasonably be entertained. I accordingly will not disturb the court's findings and uphold both conviction and sentence.

Leave to appeal to the court of appeal is granted.

Dated at Lusaka the 11th day of February 2020

JUDGE