

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)
B E T W E E N:

SCZ APPEAL No.72 OF 1993

KAYAWE KUFWAINDA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Bweupe, D.C.J., Muzyamba and Musumali, J.J.S.

13th July, 1993 and 3rd May, 1994

For the Appellant: Miss M.L. Henriques, Senior Legal Aid Counsel

For the Respondent: Mrs. E.M. Chipande, State Advocate

J U D G M E N T

Muzyamba, JS. delivered the judgment of the court

This is an appeal against conviction only.

The appellant was convicted of murder contrary to Section 200 of the Penal Code, Cap. 146 of the Laws of Zambia and sentenced to death.

The particulars of the offence were that Kayawe Kufwainda and Kenneth Kayawe on the 2nd day of August, 1991 at Lukulu in the Lukulu District of the Western Province of the Republic of Zambia jointly and whilst acting together with another person unknown did murder ALAN MATAFU. At the close of the prosecution case the second accused was found with no case to answer and acquitted.

The prosecution case was that the deceased was a mail runner. On 31st July, 1991 PW.1, Chrispin Kamutu Lutema gave the deceased an amount of K92,599-02 in cash being salaries for teachers and instructed him to go to various schools and pay the teachers their salaries. On 2nd August, 1991 at Mukuma Primary School in Lukulu the deceased paid PW.2 Micheal Mubita Kabanda his salary. PW.2 then prepared food for the deceased to eat and after he had eaten the deceased left. This was after 09.00 hours. Later, on the same day, the appellant approached PW.2 at his house looking for the deceased. PW.2 told the appellant that the deceased had left and showed him the way the deceased took. The appellant left and went in the same direction as the deceased. Later again, on the same day, PW.2 was approached by accused 2 who was looking for the appellant and later also left in the same direction as the deceased and appellant. On the same day PW.2

found the appellant and accused 2 buying and drinking beers using new K50 notes with serial numbers beginning with A/P. This was on Friday. On Monday at about 14.00 hours PW.2 was approached by one Desmond Masola and his wife Muzala who accused him of concealing the death of their relative, Joseph Kamiza. When PW.2 told them that he had not seen Kamiza but the deceased Masola is alleged to have told him that a man was killed in Matete Forest and advised him to keep quite. On 6th August, 1991 PW.2 and two school children went to Desmond Masola who showed them the deceased's body. The matter was then reported to the Police. The appellant and accused 2 were picked and the appellant led the Police to the recovery of money, salt and soap. Under warn and caution the appellant gave an explanation of how he came in possession of the money and other items. He said and we quote from Exhibit P17, the statement:

"I do remember it was on 4th August, 1991 around 21 hours I was in my house sleeping whilst in bed I heard a knock on my door then upon hearing this knock I came out when coming out I found that it was my young brother Mr. Masambo Chinyambo of Fwelu Village, Kanyenge area across the Lungwevungu river. Then when I approached him he told me that he had brought some money to me in order to hide it for him and before that he gave me K1,500-00 in K50-00 notes which he told me that he had given it to me for my own personal use. Thereafter is when he gave me the money which was wrapped in a plastic paper but we did not count that money 2 Kg table salt and a piece of dambo soap thereafter he left and promised me to come back after some time. Then on the following day I hid the money in the bush, and the K1,500-00 which he gave me I bought three morice chairs from M/Maurice Namawa of V. Kapyololo Mukusa area. Then on 11th August 1991 at about 16.00 hours I was at my home when Police men came to collect me and when we reached at Lukulu Police I revealed to the officers that the money was with me and on 19th August, 1991 I led the Police Officers to our home and showed them the money where I had hid it in the bush and when Police Officers counted this money in my presence it was K38,790-30n in K50 notes with few coins. This is all what I know."

PW.3, Maurice Susiku Namawa confirmed that the appellant bought chairs from him and paid him K1,500 and PW.4, Chainda Mulongwe confirmed that the appellant had a young brother by the name of Hasambo but that he had not seen him since 1990.

When put on his defence the appellant elected to remain silent and called no witnesses.

In arguing the appeal on behalf of the appellant Miss Henriques mainly attacked the findings of the learned trial Judge. In his judgment the learned Judge made the following findings of fact:

- (a) At Mukuma Primary School where PW.2 was a teacher, that the appellant followed the deceased after the deceased had left after paying PW.2.
- (b) That on the same day the appellant and accused 2 were seen by PW. 2 spending money lavishly on beer and were using brand new K50 notes.
- (c) That the appellant incriminated his young brother knowing that he could not be traced.

Miss Henriques submitted that these findings were erroneous. On the first finding she submitted that PW.2's evidence was that the appellant went in the same direction as the deceased. That going in the direction was not the same as following someone. That one can go in the same direction and yet not follow the other. On the second finding she submitted that PW.2 said that he found the appellant and accused 2 buying and drinking beers. That they bought the beers with new K50 notes. That there was no evidence of how many beers they bought and consumed and how much they spent or indeed the price of each beer. That in the absence of such evidence it could not be said that the appellant and accused 2 spent money lavishly on beers. On the third finding she submitted that there was no evidence that the appellant's young brother could not be traced. She therefore urged the court to find the appellant's explanation of how he came in possession of the money and other items as reasonably true and to allow the appeal. In response, Mrs. Chipande said she supported the conviction because the circumstantial evidence against the appellant was overwhelming. She said that the appellant went to PW.2 looking for the deceased and was later seen spending a lot of money on beers on 2nd August, 1991, the date the deceased was killed. That if the appellant was given K1,500 by his brother on 4th August, 1991 and used it to buy chairs then where did he get the money for beers. That failure by the prosecution witness to trace the appellant's young brother did not in any way

weaken the prosecution case. That the learned trial Judge was therefore right in rejecting the appellant's explanation of how he came into possession of the money and she urged the court to refuse the appeal. In reply Miss Henriques drew the court's attention to the fact that there was no evidence that the deceased died on 2nd August, 1991.

We have considered the submissions by both Counsel and the evidence on record. The post mortem, according to PW.5, Constable John Mumba Kapotwe was conducted on 11th August, 1991 and part of the post mortem report dated 12th August, 1991 reads:

"I am of the opinion that death occurred more than 7 days before my examination".

It is quite clear from the report that the Pathologist was unable to form an opinion of the date of death of the deceased. More than seven days before the post mortem i.e. 11th August, could be any date between 2nd and 4th August, 1991. We therefore accept Miss Henriques's submission that there was no evidence that the deceased died on 2nd August, 1991. He died between 2nd and 4th August, 1991.

The appellant, in his warn and caution statement said that the money, table salt and dambo soap were given to him by his young brother, Masambo on 4th August, 1991 at about 21 hours. The following day he hid the money which was in the plastic bag and with K1,500 he bought some chairs. This was confirmed by PW.3. He also told the second accused the same story and in his warn and caution statement accused 2 confirmed that the appellant told him that his young brother gave him the money and other items.

The fact that the appellant's young brother existed was Common ground. In his statement the appellant gave his brother's address as Fwelu Village, Kanyenge area across the Lungwevungu river. PW.4 admitted in his evidence that the appellant's young brother lived across Lungwevungu river and according to PW.6, the investigating officer he made attempts to locate the appellant's young brother. He said at pages 13 and 14 of the record:-

"As the accused insisted that these items were given to him by his young brother Masambo Chinyambo of Chifwelufwelu Village I interviewed PW.3 about the said accused's young brother. PW.3 confirmed that that man was last seen in May, 1990..

After I had recorded these statements I then rendered the two accused in custody pending further investigations. I went back to that area beginning from Kanyenge area to Lutemba to look for Chinyemba Masambo but I failed to find him. I went up to Chitokoloki but I did not find him there. I made all necessary inquiries about this man but to no avail."

It is quite clear from what this witness said that he made inquiries in wrong places. He did not go to Fwelu village, the address given to him by the appellant. Had he gone to Fwelu village may be he could have found the appellant's brother or got information leading to him. His failure to do so was certainly fatal to the prosecution case. We would therefore agree with Miss Henriques that the learned trial judge was wrong in his finding that the appellant incriminated his brother knowing that he could not be traced. Had the learned trial judge addressed his mind to this fact we have no doubt that he would have come to a different conclusion. We find therefore that the appellant's explanation of how he came into possession of the money, salt and soap might reasonably be true. For this reason we would allow the appeal and quash the conviction and set aside the sentence. The appellant is acquitted.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

.....
W.M. MUZYAMBA
SUPREME COURT JUDGE

.....
C.M. MUSUMALI
SUPREME COURT JUDGE