ANDREW TEMBO
v
THE PEOPLE

SUPREME COURT
MAMBILIMA D.C.J., CHIBOMBA, AND PHIRI, (JJS).,
1st MARCH, 2011 and 7th JUNE, 2011
(S.C.Z. Judgment No. 13 of 2011)

[1] Criminal Procedure -Appeal - Whether - Court entitled to hear and determine an appeal on the basis of a judgment of a trial Court.

[2] Criminal law - Conviction - Whether can be set aside in the face of strong eye witness evidence

[3] Criminal law - Robbery and murder - Sentencing - Whether there are extenuating circumstances to reduce death sentence to custodial sentence in the face of a brutal murder.

The appellants were tried and convicted by the High Court of two offences. One of aggravated robbery, contrary to section 294 (2) of the Penal Code. And the second one was of murder contrary to section 200 of the said Code. The appellants appealed against the conviction and sentence.

Held:

1. The Supreme Court has had occasion in the past to hear and determine criminal appeals on the basis of a judgment of the High Court.

2. Thus, where a judgment of the trial Court sufficiently summarises the evidence of pertinent witnesses, an appellate Court can be able to assess the weight of such evidence, and to determine whether the decision of the lower Court should stand.

3. The Supreme Court had a High Court judgment which sufficiently summarised the evidence that was adduced before it.

4. The Supreme Court could not fault the conviction by the trial judge in the face of strong eye witness evidence.

5. The deceased was brutally killed in the course of a robbery. And there were no extenuating circumstances to warrant reducing the death sentence to a custodial sentence.

Cases referred to:

1. Musukuma v The People (1972) Z.R. 106
2. Makafi v The People Appeal Number 4R1 of 2010 (unreported)

3. Bubal v The People Appeal Number 28 of 2005 (unreported)

Legislation referred to:

1. Constitution, cap 1, Article 18.
2. Supreme Court Act, cap 25, Rule 31(1) to (4).
3. Penal Code, cap 87, ss. 200 and 294(2)

M. Phiri of Messrs Mwansa Phiri and Partners for the appellants.
C.F.R. Mchenga, Director of Public Prosecutions for the respondent.

MAMBILIMA, D.C.J.: delivered the judgment of the Court. The two appellants were tried and convicted by the High Court at Lusaka, of two offences; one of aggravated robbery, contrary to section 294 (2) of the Penal Code cap 87 of the laws of Zambia. While the second was of murder contrary to section 200 of the said Code. There is on record, an affidavit by one, Mulape M. Jila, a supervisor at the High Court Criminal Registry, in which she deposed that the High Court record of proceedings in this case could not be located. She submitted a judgment of the Court and urged us to hear the appeal based on the said judgment.

The prosecution evidence, as summarised in the judgment of the High Court, shows that a total of eight witnesses were called. The first witness was Ackson Tembo. He testified that on 20th October, 2000, around 1900 hours, he was standing at the junction of Ng'ombe and Kalundu roads in Lusaka, when he saw a bus coming from Ng'ombe compound. It by passed him and shortly after that, a person was thrown out of the moving vehicle. That person called his name and it turned out that PW 1 knew him before. He was Emmanuel Sichulunda (PW 4), the conductor of the bus. The man informed him that the bus was being robbed and that the driver of the vehicle was still in it. A short while later, another friend of PW 1, by the name of Ayeko Samson Ngambi, (PW 2) came by in a vehicle. Upon explaining to him what had transpired, they followed the bus in PW 2's car. They trailed behind and saw the bus turn into Garden Compound. They pursued the bus until it reached a dead end. Four people came out of the bus and started running. PW 1 pursued one suspect, while his friend PW 2, pursued another. After about ten meters, PW 1 apprehended the man he had pursued. The suspect produced a screw driver and in the course of their struggle, he stabbed him (PW 1). PW 2 also apprehended the suspect whom he was chasing after he fell. Both witnesses told the Court that they did not lose sight of the suspects they were chasing. PW 1 identified the suspect whom he chased as the 2nd appellant. He told the Court that he recovered a pistol from him. PW 2 identified the suspect whom he apprehended as the 1st appellant. Police came on the scene, and the two suspects were handed over to them. When PW 1 opened the door of the bus, he found the body of the driver, Rabson Mwanza. It was later conveyed to the hospital.

The judgment does not contain the evidence of PW 3. PW 4, the conductor of the bus, told the Court that he worked with the deceased driver, Rabson Mwanza on the fateful day. They were using a Toyota Ace, Registration Number AAP 7899. That around 19:00 hours, they were coming from town going to Ng'ombe, and when they reached Twambo, four men boarded the bus. That as they drove, one

of them held him by the neck and threw him out of the bus through the window. He screamed for help and then saw PW 1. He narrated to him what had happened. Together with PW 2, they followed the bus. PW 4 was unable to identify any of the assailants.

PW 5 is the owner of the bus that was stolen. He received a report of the theft of the bus. The police later informed him that it had been recovered and two suspects had been apprehended. But that the driver of the bus had been killed.

A post mortem was conducted on the body of the late Rabson Mwanza by Dr. Garg. It was attended by PW 6, Gershom Mwila and the body was identified to the doctor by Vincent Mwanza, the brother to the deceased.

The investigating officer was Feddy Shaman'amba (PW 7). He collected the suspects from Ng'ombe Police Post and brought them to Civic Centre Police post where he interviewed them. He came to know them as Crispin Banda and Andrew Tembo. He recorded warn and caution statements from them for the offences of aggravated robbery and murder. They each denied the offences. This witness also retrieved a revolver that was alleged to have been used in the robbery and produced it as part of his evidence. With the evidence of this witness, the State closed its case, whereupon both appellants were found with a case to answer and put on their defence. They elected to give evidence on oath.

From his evidence, it would appear that the 1st appellant knew the 2nd appellant before the date of the robbery. He denied having been involved in the robbery, and according to him, both PW 1 and PW 2 told lies to the Court. He told the Court that he was a seller of some merchandise. That when he went to the place where he plied his trade, a neighbour informed him that the 2nd appellant had been picked by the police and taken to Garden Police Post. He went there to inquire about him but a police officer asked him why he was looking for him (2nd appellant). That the police officer also asked him (1st appellant) whether he knew the friends of the 2nd appellant. He was apprehended and later taken to Chelstone Police Station where he was interrogated. The police asked him about a person called Richard and also for information regarding some goods that were sold by the 2nd appellant. Three police officers took him to his home where they asked his mother about Andrew Tembo. He was later taken to Lusaka Central Police. He was taken to Chikwa Court a week later, on 23rd October, 2000. He told the Court that it was at the Court that he met the 2nd appellant. On the basis of the evidence given by the 1st appellant, the prosecution sought leave, and was allowed to call PW 8, Alick Syamuchelo, to testify as to whether the 1st appellant was in police custody between 12th and 24th October, 2000. The evidence of PW 8 was that there was no record indicating that the 1st appellant was in police cells during the stated period. He produced the OB Book to form part of his evidence.

The 2nd appellant in his evidence, told the Court below that he used to work for the 1st appellant. In his evidence, told the Court below that he used to work for the 1st appellant selling merchandise at Garden Compound. He denied having committed the offences in this case, and said that all the witnesses who gave evidence against him were lying.

The version of the 2nd appellant on the events of 20th October, 2000, is that on this date, he was at his place of work. He drank beer with some friends who included Allan Phiri and Mabvuto Tembo. Around 1920 hours, a certain lady came to the shop and asked for shake shake beer. After he gave her the beer, a man came and asked him why he had given the lady beer. The man shouted at him and a fight ensued whereupon the man started bleeding. The police came and conveyed both of them to Garden Police post. Later, he was taken to Los Angeles Police post where he stayed for four days. He was later taken to Lusaka Central Police station and from there, he was taken to Chikwa Court. He echoed the evidence of the 1st appellant that, that is where they first met, after the events of 20th October, 2000.

After evaluating the evidence that was before him, the learned trial judge accepted the evidence of PW 1, and PW 2 and rejected the evidence of the two appellants. According to the judge, the evidence of the appellants was a ".....fabrication, unreliable, untrustworthy and pack of lies intended to mislead this Court.." The judge was of the view that from their demeanor, the appellants had the propensity to tell lies. He found them guilty of having robbed Rabson Mwanza of a motor vehicle, registration number AAP 7899, and of having murdered him. He convicted them accordingly.

The appellants have now appealed to this Court against the conviction and sentence, advancing four grounds of appeal. These are that:

"1. the Court below erred in law and fact in convicting the appellants for the subject offence on insufficient evidence. There is no evidence on record linking the pistol to the accused person;

2. the Court below erred in fact when it stated at page 16 of the judgment paragraph 20, that A1 and A2 were apprehended by PW 1 and PW 2 with the help of members of the public and thereafter taken to Garden Compound Police post as such a finding is contrary to what PW 1 and PW 2 said on page 12 paragraph 5; and paragraph 25;

3. the Court below erred both in law and fact by omitting in the judgment the evidence of PW 3, and it is not known what PW 3 said in Court; and

4. the Court below erred in fact by describing the evidence of DW 1 and DW 2 as fabrication, unreliable, untrustworthy and a pack of lies without giving details or reasons thereof."

Mr. Phiri, the learned counsel for the appellants filed written heads of argumentss which he augmented with oral submissions. In the submissions, counsel introduced another ground of appeal. This is the lack of a complete record or proceedings from the Court below. He submitted that the record before us contravenes the provisions of Rule 31 (1) to (4) of the Supreme Court Act, cap 25 of the laws of Zambia in that it is comprised only of the High Court judgment. According to counsel, the record of appeal, is so defective that the appellants have been deprived an opportunity to effectively argue their appeal. He contended that in the absence of a complete record of appeal, the rights of the appellants to a fair trial as guaranteed by Article 18 of the Constitution cannot be achieved. He also pointed out that the evidence of PW 3 is missing from the record. According to counsel, this meant that the summary of the case as given by the judge in the judgment did not reflect a fair and accurate record of what transpired in the Court below. He contended that it would, in the circumstances, be unsafe to rely on the record. He urged us to allow the appeal, and quash the conviction and set the appellants at liberty.

He urged us not to send the case back for re-trial because of the time that has passed between then and now, which is eleven years.

To buttress his arguments, counsel referred us to the case of Musukuma v The People (1), a High Court decision by Doyle C.J. sitting as a High Court judge. It involved an appeal to the High Court from the decision of the Subordinate Court. The record of proceedings did not contain the trial Court's judgment. On this premise, the Court held that the record of appeal was so defective that the appeal could not properly be heard. The conviction was quashed, notwithstanding that the evidence against the appellant was very strong. After his submissions on the incomplete case record, counsel stated that he did not find it necessary to argue the other grounds of appeal one by one. In response, the learned Director of Public Prosecutions (DPP) conceded that the record of appeal in this case was defective. He argued however, that the judgment of the Court below has provided a summary of the evidence that was before the High Court. In his view, it was possible to argue the appeal based on the judgment only.

On the submission that the evidence of PW 3 was not set out in the judgment, the DPP submitted that the failure to do so did not in any way prejudice the appeal, because the trial judge did not rely on it when he came to his conclusion. He went on to state that the evidence against the appellants as reflected in the judgment of the Court below is overwhelming. That the evidence of PW 1, PW 2, and PW 4, shows that the two appellants were caught in the act. The motor vehicle was stolen, pursued and the two appellants were apprehended when they jumped out. The search of the vehicle revealed the body of the driver.

On the argument that the trial judge did not indicate his reasons for rejecting the evidence of the appellants, the DPP submitted that looking at the explanations given by the appellants, and considering the circumstances in which they were apprehended, the learned trial judge was entitled to come to a conclusion that their evidence was a fabrication, unreliable and not trust worthy. It was his submission that the two appellants were properly convicted and this appeal should be dismissed.

In his response, Mr. Phiri for the appellants echoed his earlier submission that the trial judgment was defective in that the evidence of PW 3 was missing. That the appellants would have loved to see what PW 3 said. He argued that the Court below should have given reasons why it did not believe the appellants because from the judgment, it was difficult to comprehend the reasoning of the Court below. He argued further that relying on a judgment alone in such a matter does prejudice the appellants in this case. He maintained that the case of Musukuma v The People (1), clearly held that a conviction cannot stand where the record is so defective that an appeal could not properly be heard.

We have considered the judgment of the Court below, and the issues that have been raised in this appeal. From the oral and written submissions that have been made on behalf of the appellants, their main argument in this appeal rests on the absence of a complete record from the Court below; and the fact that the evidence of PW 3 has not been summarised in the judgment. We have had occasion in the past, to hear and determine criminal appeals on the basis of a judgment of the High Court. One such matter is the case of Bubal v The People (3). The proceedings of the trial in the High Court could not be

located. Only the judgment of the High Court formed the record of appeal. The appeal was heard and determined on the strength of the judgment only because the trial judge sufficiently summarised the evidence that was before him. In another case of Makafi v the People (2), we ordered a re-trial and sent the case back. The appellant, in that case was tried by the Subordinate Court for assault occasioning actual bodily harm. He was sentenced to a term of imprisonment and ordered to receive strokes of the cane. He lost the appeal in the High Court and appealed to this Court. The record of proceedings of the trial Court including the judgment could not be traced and the appeal came before us only with the High Court judgment. The High Court judgment did not summarise the evidence adduced before the trial Court in sufficient detail. We were therefore unable to resolve the issues in contention.

What comes out from our decisions referred to above is that where a judgment of the trial Court sufficiently summarises the evidence, of pertinent witnesses; and the appellate Court can be able to assess the weight of such evidence and to determine whether the decision of the lower Court should stand. In the case of Musukuma (1), cited to us by the appellants, it was the judgment of the Subordinate Court that was not produced on appeal. It follows therefore that in such a case, the decision appealed against is not before the Court. The reasoning of the Court in arriving at its decision is not availed to the appellate Court. The Musukuma case is distinguishable from the case before us because unlike in that case, we do have the High Court judgment which has sufficiently summarised the evidence that was adduced before it. Mr. Phiri's argument cannot therefore be sustained.

Although the appellants advanced four other grounds of appeal, they only argued ground three, which is on the omission of the evidence of PW 3 in the Court below. As the DPP has observed, the evidence of PW 1, PW 2 and PW 4, was to the effect that they pursued the stolen bus; that when it reached a dead end, four people jumped out; that they each pursued a suspect without losing sight of them and apprehended the two appellants in this case. The body of the driver was found in the bus. This evidence was considered against the evidence given by the two appellants who completely denied having been at the scene of crime. The learned judge in the Court below believed the evidence of the prosecution witnesses, and found that the evidence that was given by the two appellants was a fabrication, unreliable, untrustworthy and a pack of lies. We cannot fault the judge in the Court below for reaching such a conclusion in the face of strong eyewitness evidence that was given by PW 1, PW 2, and PW 4. As the DPP has correctly pointed out, the trial judge did not take into account the evidence of PW 3 in reaching his conclusion.

For these reasons, we find no merit in all the grounds of appeal. It is dismissed.

As to sentence, we note that this was a heinous crime in which the deceased was killed in cold blood and a bus stolen from him. Even if the appellants have argued that there was no evidence linking the pistol to the accused persons, PW 1 did testify that he recovered a pistol from the 1st appellant. The deceased was brutally killed in the course of a robbery and we find no extenuating circumstances to reduce the death sentence with regard to the case of murder to a custodial sentence. The appeal against sentence is also refused.

Appeal dismissed.