

IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 27, 28, 29/2016**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

JABULANI KHUMALO	1ST APPELLANT
CEASER NYENDWA	2ND APPELLANT
MUSANIDE LINDILILANI	3RD APPELLANT
AND	
THE PEOPLE	RESPONDENT

Coram: Muyovwe, Kabuka and Chinyama, JJJS
On the 6th of September, 2016 and 14th September, 2016

For the Appellant: Mr. A. Ngulube, Director of Legal Aid

For the Respondent: Ms. N.T. Mumba, Deputy Chief State Advocate

J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **R. v Barnes (1940) 2 ALL E.R. 229**
2. **Inambao vs. The People (1969) Z.R. 84**
3. **R. v Coney (1882) 8Q.B.D 534**
4. **Shamwana and 7 Others vs. The People (1985) Z.R. 41**
5. **Chimbini vs. The People (1973) Z.R. 191**
6. **Katebe vs. The People (1975) Z.R. 13**
7. **Mwape vs. The People (1976) Z.R. 160**

8. **Haonga and Others vs. The People (1976) Z.R. 200**
9. **Simon Malambo Choka vs. The People (1978) Z.R. 243**
10. **Isaa Mwasumbe vs. The People (1978) Z.R. 354**
11. **Manyepa vs. The People (1975) Z.R. 24**

Legislation referred to:

1. The Penal Code Chapter 87 of the Laws of Zambia

The appellants were convicted and sentenced to death by the High Court sitting at Lusaka for the offence of murder contrary to Section 200 of the Penal Code Cap 87 of the Laws of Zambia.

The particulars were that on the 3rd November, 2013 at Lusaka they jointly and whilst acting together, murdered Lawrence Mwamba (hereinafter called 'the deceased').

The facts were that on the night of the 2nd November, 2013 around 22:00 hours, Mike Zulu, the eye witness in this case, was in his house when he heard a person screaming outside that he was dying. He peeped outside through the broken air vent of the house and saw the 1st appellant pulling the deceased outside the bar several times and each time the deceased would stagger back inside the bar and three men were seen inside the bar assaulting the deceased. He described the deceased as being light in complexion

and his hair was in dreadlocks. According to Mike Zulu, he was able to see what was happening inside the bar as the windows were broken. At first, he thought that the people were drunkards but fearing that they were thieves, he decided to go to bed. At that time, there were no patrons as the bar had closed. Around 04:00 hours he was woken up by noises of people shouting outside. He rushed outside only to find the deceased lying on the ground a few metres from Katete bar. Mike Zulu observed that the deceased was clad in a short and it appeared that his legs were broken. An hour later, the deceased passed on.

At this point, Mike Zulu led the people he found outside to Katete Bar. They tried to get into the bar but the grill door was locked. The 1st appellant initially refused to open the grill door but eventually he opened for them. Mike Zulu observed that the 1st appellant's shirt had blood stains. When he questioned the 1st appellant as to why he had assaulted the deceased, the 1st appellant implicated the 2nd and 3rd appellants who were in a room inside the bar. The trio had slept in the bar. Mike Zulu observed that there was blood on the walls and pieces of dreadlocks strewn

on the floor. The three appellants were accordingly apprehended and taken to Chipata Police post.

The evidence of Ackson Banda, the bar owner was that on 2nd November 2013, he was at his bar. Around 21:00 hours, he went away leaving behind his workers, the 2nd and 3rd appellants. He explained that the 2nd and 3rd appellants used to sleep in the bar. Ackson Banda also confirmed that his brother in law, the 1st appellant, used to spend time at the bar and sometimes he would also sleep there. In the early hours of the 3rd November, 2013 Ackson Banda learnt that there was a break-in at his bar and he rushed to report the matter at Chipata Police Post after hearing that the situation at the bar was volatile. While he was still there, the 1st, 2nd and 3rd appellants were brought and taken into custody.

Detective Sergeant Luckson Mwiya the investigations officer explained that from the investigations conducted, Arnold Mubita (who was the fourth accused in the court below) was doing piece work outside the bar at the time the deceased was assaulted. The postmortem examination that was conducted on the deceased's body revealed that the cause of death was traumatic shock due to

multiple sharp force injuries. The appellants were subsequently charged with the subject offence which they denied.

In his defence, the 1st appellant said on the night in question, he went to Katete Bar around 22:00 hours where he found a fight in progress between Arnold Mubita, the 2nd and 3rd appellants and the deceased. According to the 1st appellant he tried to stop the fight but failed and in the process, his shirt was stained with blood. He acknowledged dragging the deceased and Arnold outside the bar as a way of stopping the fight. Later, he changed his story and stated that the persons involved in the fight were the deceased and Arnold Mubita but that the 2nd and 3rd appellants were also fighting with an unknown person. The 1st appellant said he observed that there was blood inside the bar and conceded that he did not report the fight to the police yet he described it as a bad fight. The 1st appellant stated that the next morning, a lot of people came to the bar and when he opened the door, they started beating him and he ran to the police post. Whilst there, the 2nd and 3rd appellants were also brought. It was his evidence that whilst in police custody, he learnt that the man who was involved in the fight had passed away.

As for the 2nd appellant, while admitting that he was at Katete Bar on the night the deceased was assaulted, he distanced himself from the assault and alleged that it was Arnold Mubita who fought with the deceased. According to the 2nd appellant, the next morning, people stormed into the bar and out of fear he ran to the police. He admitted seeing the deceased bleeding from the nose and that he had a cut on his eyebrow.

In his defence, the 3rd appellant also placed himself at the scene of the assault. He too alleged that Arnold Mubita was the one who assaulted the deceased with a panga. The 3rd appellant explained that it was the 1st appellant who managed to separate the fight between Arnold Mubita and the deceased by pushing them both outside the bar.

In her judgment, the learned judge below relied heavily on the evidence of Mike Zulu, whom she found to be a credible witness. The learned judge found that Mike Zulu's evidence was unchallenged and was corroborated by all the appellants with regard to the assault on the deceased and the evidence found at the scene of crime. The learned judge found that the appellants placed

themselves at the scene of crime and in their evidence, they implicated each other. The learned judge also found that the act of pulling the deceased from the bar was a repeated act and that all the appellants acted together in assaulting the deceased. She found that death was the probable consequence of the kind of beatings inflicted on the deceased. She was of the view that although the assault took place at a bar, there was no evidence of drunkenness to afford extenuation and that there was also no evidence of provocation. She accordingly sentenced each appellant to the mandatory death sentence.

Before us, the appellants have advanced three grounds of appeal. In the first ground of appeal, Counsel attacks the finding by the learned judge that there was unity of purpose among the appellants in the commission of the offence. The second ground is to the effect that the trial court failed to properly apply the law on accomplice witnesses. The third ground attacks the appellants' conviction as unsafe, alleging that the learned judge relied heavily on the evidence of Mike Zulu, while disregarding that of the appellants and the surrounding circumstances.

On behalf of the appellants Mr. Ngulube the learned Director of Legal Aid filed heads of argument which he relied on.

In support of ground one, Counsel submitted, *inter alia*, that the trial court was wrong to rely on Section 21 and 22 of the Penal Code although these sections cover situations where more than one person is involved in the commission of the crime. The gist of the arguments on this ground is that there was no common purpose between the appellants. It was submitted that their mere presence at the scene of crime cannot lead to the conclusion that they participated in the commission of the crime. Counsel argued that there was no evidence to show that the trio planned together to commit the crime and neither was there evidence that they actively participated in the beating of the deceased. Counsel took the view that the evidence of Mike Zulu revealed two contradictory positions: that the appellants attacked the deceased; and at the same time suggested that they did not beat the deceased.

Specifically addressing each appellant, it was submitted that the 1st appellant was merely protecting the deceased by getting him out of the bar. With regard to the 2nd and 3rd appellants, Counsel

submitted that Mike Zulu did not point out the roles the two played during the assault on the deceased.

On ground two, it was submitted that the trial court misdirected itself when it found that the evidence of the appellants implicating Arnold Mubita in the court below required corroboration before it could be relied upon. It was Counsel's position that evidence of a co-accused implicating another is admissible with or without corroboration. In the event that there is no corroboration, the trial court has a duty to warn itself of the danger of convicting on uncorroborated evidence and eliminate both the danger of false implication and the possibility that the accused implicating another may have their own purpose to serve. Counsel referred us to the editorial note of the case of **R. v Barnes**¹ in which it was stated that:

"The necessity for corroboration of the evidence of accomplices applies only in the case of evidence called by the prosecution. Where accomplices are called by the defence and the jury are not asked by the prosecution to act upon their evidence, there is no need for such corroboration."

In ground three, Counsel contended that the trial court was wrong to rely heavily on the evidence of Mike Zulu as he contradicted himself when in one breath he said the deceased was

being pulled out of the bar by the 1st appellant; and in the next breath his evidence was that the deceased was being beaten inside the bar and that he did not see the appellants beat the deceased. Further, that Mike Zulu stated that the 1st appellant's shirt had blood stains yet the shirt was not produced in court. Counsel argued that failure by the trial court to consider the testimony of the appellants led to the acquittal of the guilty man (Arnold Mubita) in the court below. It was submitted that the knife and panga were not produced in court despite the fact that the 1st appellant stated that he was shown the two items.

Counsel urged us to allow the appeal.

At the hearing, Ms. Mumba was granted leave to file the respondent's heads of argument which she relied on.

In response to ground one, Ms. Mumba submitted that the learned judge was on firm ground when she found that there was unity of purpose and that the appellants fell within Section 21 and 22 of the Penal Code and in the ambit of the case of *Inambao vs. The People*² in which Section 21 of the Penal Code was expounded. Counsel submitted that Mike Zulu's testimony linked the appellants

Arnold Mubita was from the appellants whose evidence lacked corroboration. Consequently, that the danger of a concocted story designed to implicate Arnold Mubita did exist.

Counsel also referred to the testimony of the 1st appellant in the court below in which he said the fight was between the deceased on one hand and Arnold Mubita, the 2nd appellant and 3rd appellant on the other hand. However, the 1st appellant changed his position in cross examination by removing the 2nd and 3rd appellants from the fight. It was Counsel's submission that this clearly showed that the 1st appellant was an untruthful witness who could have fabricated the story against Arnold Mubita whom he had no relationship with. That the 2nd and 3rd appellants who were workers at the 1st appellant's brother-in-law's bar where the fight took place also implicated Arnold Mubita. Counsel submitted that from the foregoing, the appellants were witnesses with an interest of their own to serve and that therefore, their evidence required corroboration. We were referred to the case of **Shamwana and 7 Others vs. The People**,⁴ an authority on accomplice evidence. We

this was a connecting link that he committed the offence. Counsel implored us to dismiss this ground.

In reply, the learned Director filed lengthy heads of argument. The summary of the submissions on all the grounds is that the evidence of Mike Zulu lacked sufficient detail and did not show a joint enterprise to assault the deceased. Counsel pointed out that Mike Zulu did not indicate the role each appellant played and what weapons were used in the assault. Counsel submitted that even if evidence of blood and dreadlocks was found inside the bar where the 1st, 2nd and 3rd appellants spent the night raised suspicion, their presence inside the bar was explainable so were the blood stains on the 1st appellant's shirt and, therefore, there was no evidence implicating the appellants. Counsel took the view that the need to report the assault on the deceased to the police did not arise. The learned Director reiterated his argument that there was no evidence to implicate the appellants in the death of the deceased.

In his quest to convince us that the evidence of an accomplice can corroborate the evidence of another accomplice, the learned Director went to great lengths to try and persuade us on his

proposition. According to Counsel, the **Shamwana**⁴ case which was cited by Counsel for the State does not show a pronouncement by the court that there must be corroboration where an accused gives evidence which is against a co-accused. In the alternative, Counsel submitted that should we reject his submission, we should find corroboration in the evidence of Mike Zulu. We were specifically referred to Mike Zulu's evidence where he said in cross-examination:

"I did not know accused one, accused two and accused three before the incident. I saw accused one pull the deceased. I saw accused two pulling the deceased. I did not see accused three assault the deceased".

The learned Director took the view that the above statement from Mike Zulu provided the necessary corroboration to support the appellants' case that it was Arnold Mubita who assaulted the deceased. Counsel reiterated his argument that the knife and the panga which were recovered at the crime scene should have been produced by the prosecution. He argued that non-production of the knife and panga left the question hanging as to the infliction of the injuries found on the deceased.

The learned Director urged us to allow the three grounds of appeal, quash the convictions, set aside the death sentences and set the appellants at liberty.

We have considered the evidence on record, the judgment of the Court below and the submissions by Counsel for the parties.

We will deal with all the grounds of appeal together as they are inter-twined. The issues raised in the three grounds of appeal are: whether the appellants acted with a common purpose; whether the learned judge failed to properly apply the law on accomplice witnesses and whether she unduly relied on the evidence of Mike Zulu the eye witness disregarding the evidence of the appellants against their co-accused Arnold Mubita.

From the outset, we must state that this is a case of a single identifying witness. There is a plethora of authorities where we have pronounced ourselves on the evidence of a single identifying witness. In the case of **Isaa Mwasumbe vs. The People**¹⁰ we held, *inter alia*, that:

- (i) **Usually in the case of an identification by a single witness the possibility of an honest mistake cannot be ruled out unless there is some connecting link between the accused and the offence which would render a mistaken identification too much of a coincidence, or evidence such as distinctive features or an accurately fitting description on which a court might properly decide that it is safe to rely on the identification; but where there is good quality identification evidence from a reliable single identifying witness it is competent for a court to convict even in the absence of other evidence to support it.**

In the case in *casu*, we agree with the learned Director that Mike Zulu did not give clear detail as to the role of the 2nd and 3rd appellant during the assault of the deceased. We do not, however, agree with the learned Director that Mike Zulu contradicted himself. In our view, the learned judge rightly found him reliable in his observation of the events leading to the death of the deceased. On the material night, the undisputed evidence is that the appellants were present at Katete Bar at the time the deceased was assaulted. According to Mike Zulu, he saw the 1st appellant pulling the deceased outside the bar and the deceased would stagger back

inside the bar and he saw the deceased being assaulted by three persons who were inside the bar.

With regard to the 1st appellant, the learned Director made an issue out of the fact that the blood stained shirt was not produced during trial. Our view on this issue is that the failure by the prosecution to produce the blood stained shirt did not affect the prosecution's case as it was not disputed by the 1st appellant who confirmed that his shirt was blood stained in the process of trying to separate the combatants. If the 1st appellant's story that he was protecting the deceased was anything to go by, one would have expected him to alert the owner of the bar or to report the fight to the police. Better still, he could have made efforts to ensure that the deceased received medical attention. The same goes for the 2nd and 3rd appellants that if they were mere spectators, they could have taken action to help the deceased who was severely injured. As it is, the postmortem report reveals that the deceased had multiple incised wounds on the face, head, right and left upper chest with haemorrhage as well as a penetrating wound on his left leg and the bones were fractured. Clearly, due to the severe injuries, the

deceased failed to go home as he was found the following morning lying within the vicinity of the bar from where he had been assaulted.

From the evidence of Mike Zulu which was definitely supported by the appellants, Katete Bar was the crime scene. The crime scene was littered with pieces of dreadlocks from the deceased's head and there was blood on the walls, on the braai stand and on the floor inside the bar. Again, the learned Director took issue with the fact that the knife and panga were not produced during trial. Our view is that this did not affect the prosecution's case. The fact that there was blood on certain items in the bar was not disputed and in fact, it was not disputed that a vicious attack had taken place inside the bar going by the dreadlocks and blood found there. The issue is not about production of the items which had blood but whether the appellants committed the offence. It is not in dispute that the three appellants slept inside the bar and they were all there the following morning. No reasonable person or member of our society can go to sleep in such an environment. The failure by the appellants to report the matter to the police and

even to call for help from the neighbours is a clear indication that there was unity of purpose. The evidence shows that the deceased was found by members of the public severely injured and battling for his life and he died an hour later from the injuries. This odd circumstance of the deceased being found outside a bar in which he was recently seen being beaten; not reporting to the police and sleeping in a place splashed with blood and dreadlocks all over the floor constitutes evidence of something more and is in fact, the link connecting the appellants to the commission of the offence. We are inclined to believe as the learned trial judge did, that the appellants were not mere spectators but active participants in assaulting the deceased. The passage from the record referred to us by Counsel for the appellants shows that Mike Zulu saw the 1st appellant and the 2nd appellant but he did not see the 3rd appellant assault the deceased. That is not an issue because quite clearly the 3rd appellant was also present in the bar. Mike Zulu mentioned that at the time of the assault there were no customers at the bar. We do not see how the appellants including the 3rd appellant can divorce themselves from the happenings at the bar that night.

In the case of **Haonga and Others vs. The People**,⁸ it was held, *inter alia*, that:

- (ii) **If a death results from the kind of act which was part of the common design then if the offence be murder in one then it is murder in all.**

This is the position in the case in *casu*. The appellants severely assaulted the deceased and they went to sleep inside the crime scene.

Coming to the issue of accomplice evidence, it is trite law that evidence of an accomplice requires corroboration before it can be relied upon. We agree with Counsel for the State and indeed with the holding of the trial court on this issue. The reason is simple. Accomplices are in the category of witnesses with their own interest to serve. In the case of **Simon Malambo Choka vs. The People**,⁹ we held that:

- (i) **A witness with a possible interest of his own to serve should be treated as if he were an accomplice to the extent that his evidence requires corroboration or something more than a belief in the truth thereof based simply on his demeanour and the plausibility of his**

evidence. That "something more" must satisfy the court that the danger that the accused is being falsely implicated has been excluded and that it is safe to rely on the evidence of the suspect witness.

- (ii) In the circumstances of this case the evidence of the one suspect witness could not be corroborated by the evidence of the other suspect witness.

Further, in the case of **Shamwana and 7 Others vs. The People**⁴ which we were referred to by Counsel for the State, we held, *inter alia*, that:

- (xvi) The evidence of an accused person who testifies on oath in his own defence which is against the co-accused should only be taken into account as against the co-accused if it is corroborated or supported by something more.

Looking at the arguments by the learned Director, it is clear that he has applied the **Shamwana case** out of context and we do not find it necessary to engage in legal gymnastics with him as our view is that the **Shamwana case** gives guidance to trial courts as to how to treat evidence of accused persons against each other. We cannot accept the argument that the appellants' evidence against Arnold Mubita did not need corroboration. Counsel for the


appellant cited the editorial note in the case of **R. vs. Barnes**¹ which in our view does not reflect the position of the law in our jurisdiction and it appears to us that Counsel only extracted out of the case, what he felt could help his clients. It is settled law in this country that without corroboration, the danger of false implication in accomplice evidence still exists whether it is for the prosecution or defence and a conviction would be unsafe. The learned judge was, therefore, on firm ground when she acquitted Arnold Mubita as he was not even mentioned by the eye witness Mike Zulu and he was not found inside the crime scene. Further, Ackson Banda the bar owner did not allude to his presence at the bar that night and he did not confirm that Arnold Mubita used to do piece work for him. As was submitted by Counsel for the State, the danger to falsely implicate Arnold Mubita was not eliminated and this left the trial court with no option but to acquit him.

Further, the learned judge was accused of disregarding the appellants' evidence. This is not correct. We have perused the judgment and it is apparent that the learned judge considered the evidence from both sides and accepted that of the prosecution as


more credible. It is trite law that the trial court has the right to choose whose evidence to believe. In the case of **Manyepa vs. The People**¹¹ we stated that:

“this is a matter for the court ... to decide where the truth lies as between witnesses for the prosecution and the defence.”

In sum, the evidence against the appellants was overwhelming and a guilty verdict was unavoidable. Consequently, all the grounds of appeal fail for lack of merit. We uphold the mandatory death sentence passed by the court below and the appeal is dismissed accordingly.



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE