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Appeal No. 03/2017

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

EDGAR CHINYANTA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Muyovwe and Chinyama, JJJS
On the 11th of July, 2017 and 11th December, 2017

For the Appellant: Mr. M.C. Mamachila of Messrs Iven Mulenga & Company
Mr. C. Siatwinda, Legal Aid Counsel of the Legal Aid Board

For the Respondent: Mr. C. Bako, Deputy Chief State Advocate

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to

1. **George Musupi vs. The People (1978) Z.R. 271**
2. **Jack Chanda and Kennedy Chanda vs. The People (2002) Z.R. 124**
3. **Mutambo and 5 Others vs. The People (1965) Z.R. 15**
4. **Haonga vs. The People (1978) Z.R. 200**
5. **Saluwema vs. The People (1965) Z.R. 4**
6. **Mwansa Mushala vs. The People (1978) Z.R. 58**
7. **Simon Malambo Choka vs. The People (1978) Z.R. 246**

8. **Wilson Mwenya vs. The People (1990/1992) Z.R. 24**
9. **Chimbini vs. The People (1973) Z.R. 191**

The Appellant was tried and convicted of murder. The particulars of the offence were that on the 22nd of March, 2013 at Chingola in the Chingola District of the Copperbelt Province of Zambia he did murder one Derrick Musenge. Following the conviction, the Appellant was sentenced to imprisonment for life on account that the learned trial Judge found extenuating circumstances surrounding the commission of the offence, which warranted a lower sentence than the ultimate sentence of death. The extenuating factors highlighted in the judgment of the trial Court were; beer drinking and some misunderstanding over girls.

The prosecution's case against the Appellant was mainly anchored on the evidence of Kainda Nswana (PW5). His evidence was that he knew the Appellant as owner of the bar where the deceased and Joseph Mwata (PW3) were drinking alcohol. Around 20.00 hours commotion broke out at the bar and in the process, he (PW5) saw the Appellant produce a knife from his waist with which he stabbed the deceased. The stabbing took place outside the Appellant's bar which was well lit with electricity lights. PW5

immediately approached the Appellant about the stabbing which he witnessed. In turn the Appellant offered this witness favours so that he kept the event secret; specifically, the Appellant promised him employment, offered him K1 million cash and transport to Zambezi district where PW5 hailed from. The Appellant held PW5 by his hand and they walked to Chiwempala. As they walked, the Appellant interviewed PW5. Later the Appellant hired a taxi cab and visited another beer drinking place where he feted PW5 with beer. Before they parted company, the Appellant gave PW5 his phone number and K20.00 transport money. The two parted company at about 04.30 hours when the Appellant released him.

The following day at about 16.00 hours, PW5 reported the crime at the nearest police station. Later PW5 identified the Appellant on the police identification parade which was conducted by PW7 and witnessed by PW6.

The other incriminating evidence came from PW3 who was in the company of the deceased at the time when the commotion broke out at the Appellant's bar. According to PW3, the commotion broke out between two groups of men over a group of girls who were

nicknamed "sinners" by members of the community around the Appellant's bar. According to PW3, he and the deceased were at the bar and talked to the girls and later left the bar to wait for them at a distance. As they waited for the girls to accompany them, a group of men from the Appellant's bar attacked them and beat them up. PW3 escaped from the scene. Unfortunately the deceased failed to escape the assault and was caught and taken away towards the Appellant's bar.

During the same night, PW3 returned to the area and found the deceased abandoned and lying in a pool of blood. The deceased was then taken to Chawama Hospital where he was pronounced dead. Robson Katuta (PW4) was also present at the Appellant's bar. He was called by PW3 to the scene and he lifted the deceased, put him on his back, and took him to Chawama hospital. According to PW4, he observed blood oozing from the chest area around the deceased's heart.

The other incriminating evidence was from PW2, Musonda Chinyanta, who is the Appellant's brother. According to this witness, at about 09.00 hours the next morning after the night of

the commotion, the Appellant came over to him and handed over a short baton which also had a knife embedded in it. According to PW2, the Appellant surrendered the gadget after talking to him. Soon after, PW2 learnt of his arrest and went to see him at Chiwempala police station where the Police asked him about the gadget. PW2 surrendered the gadget to PW8 and explained how it came into his possession. The gadget was produced by PW8, the arresting officer, who exhibited it during the trial. According to the medical evidence, the cause of death was a penetrating wound to the heart through the left side of the deceased's chest.

In his defence, the Appellant, who described himself as a teacher and a potential military officer (non-school cadet), testified that on the material date and time, two groups of people quarreled at his bar and he ordered each of the groups to leave the bar. According to the Appellant, he escorted the groups one after another. In the process, he fell in a pool of mud and later returned to lock up his bar. The next morning he got scared when he heard about the commotion at his bar and, as a result of that fear and in panic, he took his gadget; i.e. a short baton/knife and torch – all in

one, to PW2. He denied committing the offence but accepted that he was at the bar during the night in question and that he was drinking and selling beer when the commotion broke out. He admitted owning the exhibited gadget.

The learned trial Judge believed the evidence given by the prosecution witnesses, in particular PW5, and found that it had been corroborated by the evidence of PW2. The learned trial Judge found further support to that evidence by the Appellant's own admission that he owned the exhibited gadget and that when he heard that a person had been stabbed, he took the gadget to PW2 his brother. Thus, the learned trial Judge found the Appellant guilty of the murder and convicted him as charged.

In his appeal before us, the Appellant raised two grounds. These are:

1. The lower Court erred in both law and fact when it found that the prosecution had proved its case beyond all reasonable doubt when in fact the evidence on record raises reasonable doubts as to the guilt of the Appellant.

2. The learned trial Judge misdirected herself when she referred to the findings in the postmortem report in her judgment, which was not formerly produced and therefore could not form part of the record.

In support of the first ground of the appeal, Mr. Siatwinda submitted, in the main, that although the trial Court rightly found PW5 to have been a suspect witness, the Court did not go further to satisfy itself that the danger of false implication had been ruled out; and that it was a wrong approach for the trial Court to have found corroboration in the evidence of the knife which was recovered by the police from PW2 who happened to be the Appellant's brother. It was argued that PW5 was in a category of witnesses with a possible interest of their own to serve, and whose evidence requires corroboration as pronounced by this Court in the case of **George Musupi vs. The People**[1]. It was stated that PW5's evidence was unreliable and should have been dismissed because; first, he admitted imbibing alcohol during the night in question; second, he failed to give a good description of the murder weapon which he insufficiently described as a knife; third, that the alleged admission

by the Appellant to PW2 his brother about the knife did not amount to a confession and should have been rejected as supporting evidence against the Appellant. It was also submitted that the insufficient description of the knife by PW5 created a doubt as to whether the exhibited knife was the murder weapon in view of the absence of forensic evidence linking the knife to the injuries observed on the deceased's body.

In support of the second ground of the appeal, the learned Counsel criticized the trial Court's reference to the findings on the postmortem report, in the judgment, as no such postmortem report was produced by the prosecution during trial. The learned Counsel argued that he was aware that it is competent for a Court to convict the Appellant in the absence of a postmortem report on the record, as was held by this Court in the case of **Jack Chanda and Kennedy Chanda vs. The People**[2]. In that case, this Court held that:

> **"Lack of expert evidence of a doctor as to the cause of death is not fatal where the evidence is so cogent that no rational hypothesis can be advanced to account for the death of the deceased".**

Counsel's contention, however, was that it was difficult in this case to reconcile the evidence given by PW5 and that of PW8 on the number of injuries sustained by the deceased; PW5's evidence was that he saw the Appellant draw a knife and stab the deceased, while PW8 testified that when he arrived at the scene, he found the deceased already dead with 13 cuts on the chest. According to the learned Counsel for the Appellant, PW8's evidence suggested that the deceased was stabbed many times; while PW5's evidence suggested one incident of stabbing; and it was argued that this contradiction raised doubt as to whether indeed PW5 actually witnessed the stabbing; which doubt cannot be resolved in the absence of either the postmortem report or expert medical evidence as to the nature of the injury which actually caused the deceased's death. It was also submitted that PW8's observation of 13 cuts on the deceased's body strongly suggested that the injuries could have been inflicted by the other people who had earlier pursued and grabbed the deceased. According to Mr. Siatwinda, the latter evidence raises the question of whether or not the Appellant acted with a common design with those other people. In support of this argument, Mr. Siatwinda cited our decisions in the cases of

Mutambo and 5 Others vs. The People[3] **and Haonga vs. The People**[4]**.** In the **Mutambo case,** *the ratio decidendi* was that; common purpose need not be by express agreement or otherwise premeditated; and that express agreement is not necessary. In the **Haonga case,** it was held that where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which one, they must all be acquitted of the offence unless it is proved that they acted with a common design.

It was argued that the prosecution failed to adduce evidence to establish who inflicted the fatal blow and whether the persons who chased the deceased acted with a common design with the Appellant who denied stabbing the deceased. It was also stated that the Appellant's explanation of events outside his bar was reasonably possible and should not have been held to have been an afterthought in line with this Court's decision in the case of **Saluwema vs. The People**[5]**;** but that the Court should have found the Appellant's explanation to have raised a reasonable doubt warranting his acquittal.

Responding to the Appellant's heads of argument, Mr. Bako strongly supported his conviction for the murder of the deceased. In relation to ground one of the appeal, Mr. Bako submitted that the Appellant was well known to PW5 who saw him in the act of stabbing the deceased and confronted him immediately thereafter; that PW5 was about two meters away from the Appellant and the deceased and the place was well lit with electricity lights and visibility was good which factors led to the Appellant's recognition by PW5 who had good opportunity to observe the events at the scene of the crime, and the conduct of the Appellant after stabbing the deceased. Mr. Bako cited our decision in the case of **Mwansa Mushala vs. The People**[6] and urged us to hold that the learned trial Court was on firm ground when it relied on the evidence of PW5 as credible and dismissed the Appellant's explanation as an afterthought. Mr. Bako specifically referred us to PW2's evidence which tended to establish that the Appellant attempted to conceal the murder weapon at his brother's house (PW2). Mr. Bako argued that the Appellant did not offer any explanation why he panicked and took his knife gadget to PW2 after the stabbing of the deceased had taken place. Mr. Bako also argued that PW5 was not a suspect

witness because no motive was established on his part, to falsely implicate the Appellant with concocted falsehood.

With regard to ground two of the appeal which assailed the failure by the prosecution to present the postmortem report to the Court in order to establish the cause of death, Mr. Bako's response was that the trial Court had before it adequate information regarding the stab wounds suffered by the deceased. This evidence was given by PW1, PW5 and PW8; that their collective evidence left no doubt about the cause of the deceased's death. Mr. Bako cited a number of cases in which this Court restated the well known principle of the law of evidence to the effect that it was not necessary in all homicide cases for medical evidence to be produced in order to support a conviction for causing death; and that where there is evidence of assault followed by death without intervening factors, the trial Court is entitled to accept such evidence as an indication that the assault caused the death. Mr. Bako conceded that there was failure by the prosecution to produce the actual postmortem report which was referred to by PW1 and PW8 and that there was no reason or explanation offered for this failure. These

were the respondent's arguments and submissions in response to the Appellant's.

Ground one of the appeal alleged that PW5, who was the only eyewitness to the stabbing of the deceased, was a suspect witness. At the outset we would like to indicate that we have difficulties in holding that PW5 was a person with a possible interest of his own to serve for the simple reason that we do not find any evidence of prior connection between him and the Appellant, the victim of the crime or, indeed, anyone else who was around the scene of crime before and after the stabbing took place. We do not see any evidence suggesting any motive on the part of PW5 to give fabricated evidence against the Appellant.

There is uncontested evidence on record which establishes that the stabbing took place near the Appellant's bar at a place which was well lit with electricity; that PW5 was an independent bystander who knew the Appellant as owner of the bar and that he was standing close to the Appellant when the latter produced his knife and stabbed the deceased. According to PW5, when he

witnessed the stabbing, he challenged the Appellant and made it known to him that he had witnessed his action.

Thereafter, the Appellant grabbed PW5's hand and engaged him in a frolic of interviews and treats at various public bars for the rest of the night in order to persuade him to keep the crime a secret. As it turned out, PW5 did not keep the crime to himself. He defied the Appellant's persuasion and reported the matter to the police. In this context, it cannot be doubted that PW5 did not display any other possible interest of his own to serve, other than the interest of an eyewitness who was confronted by the offender.

On the Appellant's identity as the offender, there is ample evidence to establish that PW5 had ample opportunity to recognize him with the aid of electricity lights at the scene of crime and at various places where the Appellant feted him for the rest of the night until he was given transport fare and released to go home. PW5 was also able to identify the murder weapon which was exhibited during the trial. The Appellant's own evidence connected him to the exhibited murder weapon by his own admission of its ownership and through PW2, his brother's evidence, to the effect

that the Appellant deposited the weapon with him at his house, within a few hours of the murder.

In the Appellant's arguments in support of ground one of the appeal, Mr. Siatwinda suggested to us that the evidence of PW5 lacks corroboration. This suggestion must have been made on the assumption that PW5 was a witness with a possible interest of his own to serve, whose evidence requires corroboration in order to sustain the conviction; or whose evidence requires the Court to warn itself of the danger of false implication of the accused, and ensure that the danger is excluded **(see Simon Malambo Choka vs. The People[7])**.

For the reasons we have already given, we do not find any credibility in the assumption that PW5 was a witness with a possible interest of his own to serve. Further, PW5 was neither detained by the police, nor did he fail to report the crime to the police. His evidence should, therefore, not be treated as needing corroboration. We are fortified in drawing this conclusion in view of what we said in the case of **Wilson Mwenya vs. The People[8]** that:

"i. Where a witness is detained in connection with the same incident or does not report the incident to the police, the evidence needs corroboration".

To the contrary, we find PW5 to be a credible witness. The principle to be applied to evidence of a single identifying witness such as PW5 is well settled and has been reiterated in a plethora of cases, such as the case of **Chimbini vs. The People[9],** where we stated as follows:

"It is always competent to convict on the evidence of a single witness if that evidence is clear and satisfactory in every respect...".

In any event, the Appellant's uncontested connection to the gadget in which the murder weapon was embedded, coupled with his brother's evidence to the effect that he surrendered the weapon to him (PW2) within a few hours after the murder, provided double corroboration to the evidence given by PW5. We find no merit in the first ground of the appeal.

The second ground of the appeal attacked the learned trial Judge's acceptance of stabbing as the cause of death in the absence of a formal postmortem report being produced by the prosecution.

We note that although PW1 and PW8 testified that postmortem examination was carried out by the Doctor, no such report was produced during trial. There is no explanation on the record of proceedings for this lacuna. We can only speculate that there was no diligence in the prosecution's handling of the case. This was obviously unsatisfactory. Be that as it may, the fact that the deceased died from stab wounds was clearly never put in doubt at any stage of the proceedings. It is also abundantly clear to us that the learned trial Judge found stab wounds as the cause of death on the basis of the evidence given by four witnesses. These were, PW1 who identified the body to the doctor, PW2 who was given the knife by the appellant, PW5 the eyewitness to the stabbing, and PW8 the investigating officer who also inspected the deceased's body before the doctor's examination.

We agree with Mr. Bako that except in borderline cases, where there is evidence of an assault followed by death, without the opportunity of an intervening cause, it is competent for the Court to hold that the assault caused the death; without the need for medical evidence. Mr. Siatwinda, the learned Counsel for the

Appellant, acknowledged this principle of evidence and cited the case of **Jack Chanda and Kennedy Chanda vs. The People**[2] whose *ratio decidendi* we have already quoted in our narration of his submission. Suffice it to state that medical evidence was not necessary to prove that the deceased was stabbed to death in the present case. We cannot fault the approach adopted by the learned trial Judge in the present case. Having so found, we hold that the Appellant's complaint about insufficient description of the knife by PW5, the number of stab wounds, the argument about common design, and the complaint about lack of corroboration are all unhelpful to the Appellant's case. We find no merit in the second ground of the appeal.

Coming to the sentence, a reading of the judgment of the Court below reveals that the Appellant was spared the ultimate sentence of death because, in the trial Court's view, there were extenuating circumstances present in the form of evidence of drinking and quarreling over girls. We must state that the entire evidence on record does not support the presence of these extenuating circumstances. There is no evidence on record to

suggest that there was a failed defence of drunkenness or to suggest that the Appellant was upset with the deceased in any way in connection with the girls who attended his bar; there was no failed defence of provocation either. The appellant's defence was that he did not stab and kill the deceased. He did not offer any other defence. In our considered view, there were no extenuating circumstances in this case. The reduced sentence was, therefore, wrong in principle and we feel bound to interfere with it. We quash the reduced sentence imposed on the Appellant and substitute it with the mandatory capital punishment of death. The net result is that we dismiss this appeal.

G. S. Phiri
SUPREME COURT JUDGE

E. N. C. Muyovwe
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE