**IN THE SUPREME COURT FOR ZAMBIA**
**HOLDEN AT LUSAKA**

**APPEAL NO. 143,144, 145/2018.**

*(Criminal Appellate Jurisdiction)*

**BETWEEN:**

**MWAKA SILWENGA AND 2 OTHERS** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On the 3rd December, 2019 and on ..., 2019.

***For the Appellants:*** ***Mrs M. Marebesa, Legal Aid Counsel, Legal Aid Board.***

***For the Respondent:*** ***Mrs A. Kennedy-Mwanza, Ag. Principal State Advocate, National Prosecutions Authority.***

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## JUDGMENT

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**Chinyama, JS** delivered the judgment of the Court.

**Cases referred to**:

1. **Boniface Chanda Chola and Others v The People (1988-1989) ZR 163**

2. **Peter Yotamu Hamenda v The People (1977) ZR 184**
3. **Machobane v The People (1972) ZR 101**
4. **Fawaz & Prosper Chelelwa v The People (1995-1997) ZR 3**
5. **David Zulu v The People (1977) ZR 151**
6. **Machipisa Kombe v The People (2009) ZR 282**
7. **George Nswana v. The People (1988-1989) ZR 174**
8. **Jonas Nkumbwa v The People (1983) ZR 103**
9. **John Masefu & Ilunga Kabala v The People (1981) ZR 102**
10. **Felix Silungwe & Another v The People (1981) ZR 286**
11. **Kanyanga v The People, SCZ Appeal No. 145 of 2011**
12. **Joseph Mulenga & Ors v. The People (2008) 2 ZR 1**

**Legislation referred to:**

1. **Penal Code, Chapter 87, Laws of Zambia, sections 200 and 294 (1)**

**Introduction**

The three appellants, Mwaka Silengwa, Richard Sikapizye and Darius Simbaya (hereafter, the 1st, 2nd and 3rd appellants respectively) were convicted on one count of murder contrary to section 200 of the Penal Code and one count of aggravated robbery contrary to section 294(1) of the Penal Code. The information alleged in the first count that the three appellants together with James

Bwembya, on 28th August, 2014 at Nakonde in the Muchinga Province of Zambia, jointly and whilst acting together murdered Shadrick Sinkala. In the second count the information alleged that the three appellants, again together with James Bwembya, on an unknown date but between the 28th day of August, 2014 and 29th August, 2014 at Nakonde in the Muchinga Province of Zambia, jointly and whilst acting together robbed Shadrick Sinkala of an unregistered motor vehicle, namely a Toyota Corolla, valued at K26,000 and that immediately before or immediately after the time of such robbery used actual violence to the said Shadrick Sinkala in order to obtain or retain the motor vehicle or to prevent or overcome resistance to its being stolen or retained.

James Bwembya was found not guilty of both counts of offence after the trial and he was acquitted. The three appellants were sentenced to death on the murder charge and life imprisonment on the aggravated robbery.

**The prosecution's case**

The evidence relied on by the prosecution disclosed that on 29th August, 2014 in the morning, Shadrick Sinkala, a taxi driver was found dead in the bush along Stevenson's road in Yolo village in Nakonde. He had apparently been strangled to death based on the bruises around the neck. The hands and legs were bound with a blue nylon cord and a black belt. Witnesses described the nylon cord as a small plastic string or rope which we are in no doubt was a cord by definition. The legs and hands were in turn tied to a small tree. The unregistered Toyota corolla motor vehicle which the deceased, in the company of his elder brother Aaron Sikanyika (PW7) had borrowed from Masauso Simukonda (PW6), a taxi driver employed by Mane Simuchimba (PW5), the previous night was missing. The matter was formally reported to Nakonde police as a murder and aggravated robbery case.

According to PW7, the deceased was booked around 20:00 hours that night by a person who had initially called the deceased. This person later met the deceased who was in the company of the witness. PW7 stated that the deceased went away with the stranger

and that was the last he saw of his young brother before he was found dead in the morning.

PW2, Chief Inspector Levy Mwila of Nakonde Police, testified that information about the death of Mr Sinkala and the theft of the motor vehicle was relayed to their Tanzanian counterparts in Tunduma as per tradition that same morning. Around 09:00 hours, PW2 received a call from one Sergeant Bajo, a Tanzanian police officer in Tunduma, informing him that he should go there and have a look at some suspects they had apprehended during a night patrol. He went there with two other police colleagues.

Upon arrival at the police station in Tunduma, PW2 saw a vehicle parked outside which fitted the description of the unregistered Toyota corolla that was stolen from the deceased. The vehicle had been described as being grey in colour, having two stickers in the middle of the windscreen, a loose boot lock and it had no registration number plates. He stated that in Tanzania vehicles with no number plates were not allowed to move in the night. He was informed that that was how the vehicle was impounded and the

people inside it were apprehended and detained. He was handed the two suspects who turned out to be the 1st and 2nd appellants.

When the vehicle was searched a small black bag with a strap similar to the belt with which the deceased's limbs were tied was found behind the passenger seat. Inside it were two number plates marked ACP 7809 and a half meter knotted blue nylon cord also similar to the one with which the deceased's limbs had been tied. There was also a small knife with a wooden handle. He interviewed the duo with his colleagues and they learnt that the two acted with two others who were not there. He collected the vehicle and the two appellants and brought them to the Zambian side.

PW8, Inspector Frizele Sikaubya also of Nakonde Police who was also the arresting officer testified to the effect that he was present when PW2 returned from Tunduma with the two appellants and the motor vehicle. He checked the chassis number of the vehicle. He also saw the small black bag and its contents including the two number plates marked ACP 7809 and confirmed that the blue nylon cord in it was like the one picked at the scene of the crime. He never subjected any of the items recovered in the investigation to

fingerprint tests. The two number plates turned out to belong to a Toyota sprinter motor vehicle which the 2nd appellant used to drive as an unregistered vehicle for transport hire commonly known in local parlance as a pirate taxi. The said taxi was the property of William Siame (PW3). The 2nd appellant informed police that he had parked it at Tukuta Bar in the central business district of Nakonde. Police went there and retrieved it. It had no number plates. PW8 stated that he verbally cautioned the 1st and 2nd appellants and was led with other police officers by the 2nd appellant to the 3rd appellant's house in Tindi village within Nakonde.

In the house the police officers found the 3rd appellant with Mr James Bwembya. The two were picked up together with four mobile phones that were also found in the house. One of the phones, a Techno with an aerial was later identified by the deceased's wife, Justina Nachilongo and his brother PW7 as belonging to the deceased. The wife was not called to confirm her alleged identification of her late husband's phone. It was PW8's evidence, when cross-examined that prior to the police officers' entry into the 3rd appellant's house they were not searched to establish the items they had on

them. PW8 also stated that he had begun the process of verifying the serial number for the phone that was used to call the deceased over the booking of the vehicle the deceased was driving but was not given the printout (by MTN, the phone service provider).

PW8 also talked about being led to the scene of the crimes, that is to say, where the body of Mr Sinkala was found but it is clear that the police had already been there at least on two occasions. Guided by the case of **Boniface Chanda Chola and Others v The People**[1], the prosecution did not insist on this evidence and chose to rely on other evidence. We will equally disregard the evidence and any arguments based on the matter.

**The Defence**

All three appellants gave evidence on oath in their defence.

The 1st appellant's defence was that on 28th August, 2014, he had taken clients to Lunch Hotel in Tunduma, Tanzania using a three wheeled motor cycle that he had borrowed from a friend called Kenny after 16:00 hours. He stayed on at Lunch Hotel and attended a

concert. At one point he moved to where there was a barbeque. That was where he was apprehended with other revellers by Tanzanian police for "loitering" and he was detained in police custody.

The next day, Zambia police officers collected him together with the 2nd appellant on the allegation that they were involved in the killing of a person and the theft of a motor vehicle at Nakonde. The 1st appellant stated that he did not know any one of his co-accused or the car, the bag and its contents.

The 2nd appellant, who gave residential addresses in Nakonde and Tunduma, the former being where his parents lived and the latter being where he had been living the past three years with his wife and children, testified to the effect that he had escorted a Zambian client to Hill Park Lodge in Tunduma where the client was to spend the night. The appellant had assisted the client, during the day, to transport purchases from Tunduma into Nakonde. He stayed with the client, who even bought him some beer, for some time and gave him K20 so that he could pick him up the next morning. He had also realised K120 from the taxi business during the day. Before leaving Nakonde, he had parked the taxi, ACP 7809 at Tukuta Bar.

The 2nd appellant testified that he was apprehended by Tanzanian police between 21:00 hours and 22:00 hours while waiting for transport to take him back to Nakonde. The following morning he was told to pay Ts10,000 (ten thousand Tanzanian shillings) equivalent to K30. He offered to pay using the K20 given to him by his client the previous night and requested that he contacts the client to get another K10. The police instead told him that they had received information from their counterparts on the Zambian side and when they learnt that he was a Zambian, he was handed over to the Zambian police when they came. The police from Zambia collected him together with the 1st appellant and took them to Nakonde on the allegation that they had killed someone and stolen his car. He confirmed that he told police that he had parked the Toyota sprinter at Tukuta Bar but was surprised that it was found with no number plates when he had left them on the vehicle. He stated that police showed him a blue car at the police station in Nakonde as being where the number plates marked ACP 7809 had been found. He stated that he knew nothing about the case, the nylon cords or the wheel spanner. He denied taking police to the 3rd appellant's house.

Turning to the 3rd appellant, his defence was that on 29th August, 2014, he did not go to his shop where he operated a barbershop as well as television, radio and phone repairs within Nakonde. He stayed home nursing his wife who was not feeling well. While at home James Bwembya who was checking on a television set that he had brought for repair visited him. While there police arrived and apprehended him, his wife and Mr Bwembya. They were accused of participating in the killing of Shadrick Sinkala and the theft of the motor vehicle. He denied any knowledge of the Techno phone purported to have been recovered from him or that it was found at his home. He, however, stated that a Nokia phone which was among the four phones produced in court as having been found in his house was in fact his, taken from him by the police.

At the close of the evidence, the respective advocates on behalf of the prosecution and those on behalf of the appellants rendered their submissions in support of their cases.

**The High Court judgment**

The learned trial judge reviewed and considered the evidence adduced in the matter. He concluded that it was beyond doubt that Mr Shadrick Sinkala, the deceased, was strangled with a string (cord) and as such his death was with the necessary malice aforethought as the strangler intended to kill or knew that his action was likely to kill or cause grievous harm. Therefore, that the offence of murder had been established. The learned trial judge also found that it was not in dispute that the robbing of the deceased of the vehicle was done with violence which left him dead. Therefore, that the prosecution had also proved the offence of aggravated robbery.

The learned judge then posed the question for himself to determine: whether the four accused were connected to the murder and the aggravated robbery. He noted that there was no witness who saw any of the accused persons kill the deceased and steal the motor vehicle from him. He stated that the prosecution was relying on circumstantial evidence anchored on the evidence that the accused persons were found in possession of property that was recently stolen.

In arriving at the conclusion that the 1st and 2nd appellants were found in possession of the stolen motor vehicle, the learned judge took into account the evidence of PW2 and PW8 regarding the apprehension of the two appellants. He reasoned that the two appellants were apprehended in Tanzania; that they were only handed over to Zambian Police on specific information, as we understood the learned judge, regarding the killing of Mr Sinkala and theft of the vehicle which had been communicated to the Tanzanian authorities; that in fact the 2nd appellant confirmed in his defence that he and the 1st appellant were processed for handover after information was received from Zambia.

The learned trial judge, accordingly dismissed the 1st and 2nd appellants' explanations that they were apprehended for loitering. He found it doubtful that the 1st appellant who claimed to have been at a concert and the 2nd appellant who claimed to have been standing at a lodge (waiting for transport to return to Nakonde) could have been apprehended for loitering.

On the failure by police to test the car and other exhibits for fingerprints, the learned judge noted that although this could have

amounted to dereliction of duty, the fact that the 1st and 2nd appellants were in possession of the stolen car made it unnecessary to lift finger prints besides offsetting any prejudice that they may have suffered. For this conclusion the learned judge relied on the case of **Peter Yotamu Hamenda v The People**[2], in which this Court held that-

> **(i) Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the derelictions of duty.**

In respect of the 3rd appellant, the learned trial judge found to the effect that he was implicated by the 2nd appellant; that the prosecution's evidence was not challenged; neither was there any rational explanation how the police managed to find the 3rd appellant who confirmed that the police had never been to his house. The learned judge considered whether the 2nd appellant's alleged implication of the 3rd appellant was corroborated and found special

and compelling grounds, citing the case of **Machobane v The People**[3], in the fact that police did not know the 3rd appellant's house as well as the discovery of the deceased's phone at his house. Above this, the learned judge found that the Techno phone found in his house with the other phones, which was identified as the property of the deceased positively connected the 3rd appellant to the case.

On the issue of the police being searched before entering the 3rd appellant's house to rule out the possibility of the police having gone there with the phone, the learned judge dismissed the assertion on the basis that the 2nd appellant led police to the 3rd appellant's house and not to where the phone was. Further, that the police were looking for the 3rd appellant and not phones. The learned judge also pointed out that the fact that the 3rd appellant claimed one of the phones to be his defeated the assertion because the police could not have gone with his phone to his house. It was noted, in any case, that the claim was not raised when evidence of the recovery of the phones was being led by the prosecution.

On the issue of verifying the serial number of the phone used to call the deceased by the person who booked him, the learned judge

dismissed the argument on the basis that it was sufficient that the Techno phone identified as belonging to the deceased was sufficiently identified by PW7. The learned judge concluded that the 3rd appellant was equally sufficiently linked to the case and had not offered any reasonable explanation how the deceased's phone found its way into his house.

After considering the evidence pertaining to James Bwembya and finding that the prosecution had failed to prove the case against him and pronouncing his acquittal, the learned judge found that the circumstantial evidence connected all three appellants to the two offences. He thus found them guilty as charged, convicted them and went on to impose the sentences.

**The Appeal**

The appeal is on one ground that-

**The lower court erred in law and in fact when it convicted the appellant based on circumstantial evidence which did not take the case out of the realm of conjecture so that it attained such a degree of cogency which can permit only an inference of guilt.**

**Appellants' Submissions**

In support of the sole ground of appeal, Mrs Marebesa filed written heads of argument which she supplemented with oral arguments. The learned Legal Aid Counsel submitted on several issues to strengthen her argument that the circumstantial evidence relied on by the prosecution was weak and created doubt as to the circumstances how the 1st and the 2nd appellants were apprehended and who led police to the apprehension of the 3rd appellant. It was pointed out that no witness was brought from Tanzania to testify about the apprehension of the two appellants so that what PW2 and PW8 said about the apprehension of the two appellants is hearsay evidence which is not admissible in law. The failure to lift finger prints was cited as well as the failure by police to establish that the 1st and the 2nd appellants were the ones that had called and booked the deceased. It was submitted to the effect that the proper identity of the stolen motor vehicle was not established as there was conflicting evidence on its colour and, in any case, that no documents to establish ownership were produced. It was also argued that the ownership of the small black bag was not established especially in the absence of proof that the motor vehicle was in the possession of the 1st and 2nd appellants.

It was further argued, regarding the alleged leading of the police to the 3rd appellant's house by the 2nd appellant, that the 2nd appellant denied doing so in his evidence. On the recovery of the phones from the 3rd appellant's house, it was submitted that the extensive cross-examination of PW8 on the issue created doubt compounded by the fact that the police did not declare what they had before going into the house and conducted a search after handcuffing the 3rd appellant and his wife as well as Mr Bwembya, leaving the possibility that the police could have come with the phones.

Mrs Marebesa was also concerned that the phone alleged to be the deceased's was not satisfactorily identified; that the deceased's wife was not called to identify it but instead it was another person, PW7 who was called. She also submitted that there was a discrepancy in the description of the phone which created further doubt in the matter.

When we asked Mrs Marebesa to comment on the coincidence that the 2nd appellant was apprehended in Tunduma where a vehicle in which number plates belonging to the car he used to drive were found was impounded, the learned Legal Aid Counsel responded that

the appellant's explanation why and how he went there dispelled the coincidence. Further, that the evidence of the vehicle being in the same location was hearsay.

Mrs Marebesa also reiterated that the failure to produce the printout (from MTN) and the failure to test for finger prints which could have assisted the prosecution to prove its case beyond reasonable doubt was negligence and amounted to dereliction of duty. We were reminded that it is not the role of courts to fill in the missing evidence in the prosecution's case as this court held in the case of **Fawaz & Prosper Chelelwa v The People**[4]. We were urged to find that the explanations by the appellants were reasonable.

It was submitted in conclusion that the facts relied upon by the lower court did not amount to something more but instead created doubt; that the case had not been proved beyond reasonable doubt to justify a conviction. The learned Counsel's prayer was that we acquit the three appellants.

**Respondent's submission**

In response to the submissions on behalf of the appellants, Mrs Kennedy-Mwanza also filed written heads of argument which she augmented with oral argument. The learned Acting Principal State Advocate submitted that there is evidence which when viewed as a whole connects the appellants to the commission of the offences and which takes the case out of the realm of conjecture leaving only an inference of guilt in line with the decision in the case of **David Zulu v The People[5].**

It was submitted that there was more than one piece of evidence linking the appellants to the commission of the offence in terms of odd coincidences constituting something more as guided in the case of **Machipisa Kombe v The People[6]** where it was held that-

> **5. Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the Court is entitled to take into account. They provide a support of the evidence of a suspect witness or an accomplice or any other witness whose evidence requires corroboration. This is the less technical approach as to what constitutes corroboration.**

The coincidences were enumerated as three in the following manner. Firstly, that it was odd that the appellants were found with the vehicle stolen from the deceased barely hours after he was found

strangled to death. Secondly, that it was odd that a black bag with a strap matching the belt that the deceased was also tied with, containing number plates (of a vehicle that the 2nd appellant used to drive), a piece of blue nylon cord similar to the one the deceased was tied with, was found in the car. Thirdly, that upon being apprehended the 2nd appellant led police to apprehend the 3rd appellant where the deceased's phone was recovered barely hours after he was found strangled to death.

It was submitted that the possession of the motor vehicle and the phone by the appellants was so recent as to connect them to the offence. The case of **George Nswana v. The People**[7] and **Jonas Nkumbwa v The People**[8] were cited in support.

In apparent justification of the submission that the appellants were in possession of the stolen vehicle, it was pointed out that the 1st and 2nd appellants were apprehended in Tanzania; that the duo were handed over to Zambia Police based on the information that a taxi driver had been killed and his motor vehicle stolen; that the 2nd appellant confirmed hearing that information while at the police station in Tunduma. It was submitted that the failure to call

authorities from Tanzania was not fatal and does not take away the fact that the duo confirmed their apprehension in Tanzania although they gave different reasons for that. It was submitted that the trial court properly rejected the explanations by the appellants for being untrue in line with the case of **John Masefu & Ilunga Kabala v The People**[9].

On the failure to conduct finger print tests, it was submitted that the issue was of no consequence as the 1st and 2nd appellants were found in possession of the stolen vehicle and the case of **Felix Silungwe & Another v The People**[10] was cited for holding that-

> **(i) Where the circumstances are such that there is no doubt that a defendant has been in possession of the vehicle or of an article, the failure to take fingerprints from the vehicle or from the article could not be a dereliction of duty and the absence of finger prints cannot raise the presumption that the defendant's fingerprints could not have been on the vehicle or on the article.**

On the allegation that police may have planted the phones in the 3rd appellant's house and that the failure to produce the call records to establish the serial number of the phone which the person who booked the deceased called from MTN, Counsel submitted that these were sufficiently addressed in the judgment of the Court below.

In conclusion it was submitted that the evidence on record excludes the adoption of a less severe inference against the appellants. To buttress the submission the case of **Kanyanga v The People**[11] was submitted where it was held:

> **We are satisfied that the findings in question were not perverse or made in the absence of any relevant evidence or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.**

It was pointed out that the trial court had the opportunity of seeing and hearing the witnesses and the accused persons and was in the best position to make findings of fact. It was submitted, therefore, that there can be only one conclusion that the appellant committed the offences of aggravated robbery and murder. We were urged to uphold the conviction and dismiss the appeal.

## Consideration of the appeal and the decision

We have considered the sole ground of appeal, the evidence adduced in the court below, the judgment appealed against as well as the submissions by the learned advocates. We note that the

substance of Mrs Marebesa's arguments in this appeal was a repetition of the arguments that were already put before the learned trial judge and resolved by him in the Court below. In this appeal, it is not demonstrated why these arguments should again be placed before us when they were already resolved. As alluded to by our decision in the case cited by Mrs Kennedy-Mwanza of **Kanyanga v The People**[11], we would be disinclined to reconsider or even interfere with the findings made by the court below in the absence of evidence that those findings "were perverse or made in the absence of any relevant evidence or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make".

The common position in this matter is that there is no dispute that Shadrick Sinkala was killed and robbed of a motor vehicle that he had been driving. It is also not in dispute that the appellants were convicted on circumstantial evidence. What is in dispute, as submitted on behalf of the appellants and indeed as stated by the learned trial judge, is the identity of the person or people who killed the deceased and robbed him of the motor vehicle that he had been

driving. In other words, what evidence is there that the three appellants killed the deceased and stole the motor vehicle?

Mrs Marebesa has submitted that the circumstantial evidence relied on by the prosecution is so weak and riddled with doubts such that it cannot be relied upon while the explanations given by the appellants are reasonable and should be believed in the circumstances of the case.

We will begin with the assertion that Sergeant Bajo's statement is hearsay. The record of proceedings shows that the trial court received the statement on the basis of the exception to the hearsay rule which permits the admission of such a statement not to prove the truth of what was said but simply that it was made. It was part of PW2's narration of the events that led him to Tunduma. It is clear from the evidence that it was in consequence of PW2's communication with his counterparts at Tunduma that he travelled there where he was handed the motor vehicle answering the description of the stolen vehicle as well as the two appellants. This is the evidence which the court relied on. From this, it follows that PW2 was handed the two appellants not on account of the alleged loitering

which they claimed to have been apprehended and detained for but in relation to the mission that PW2 had gone there for.

But even if we accepted that Sergeant Bujo's statement was hearsay and it is excluded, what remains is the evidence that PW2 sent information to Tanzanian Police about the murder of the deceased and robbery of the motor vehicle; that PW2 went to the police station in Tunduma shortly after sending the information about the murder and aggravated robbery and found a motor vehicle answering the description of the Toyota Corolla that the deceased had been driving. He also found items in the car similar to those used in the murder. There were also two number plates for the Toyota Sprinter which A2 used to drive. It also goes without saying that the two appellants were handed over to PW2 by Tanzanian Police in consequence of his mission pertaining to the murder and aggravated robbery committed in Nakonde in the night gone by. They could not have been handed over to PW2 if their detention was for loitering and unrelated to the motor vehicle. The penalty for loitering as indicated by the 2nd appellant was a fine and did not require being handed over to Zambian police.

As for the 1st and 2nd appellants' explanations, it is clear from the record that they were raising them for the first time in their defences. They could have been put at least to PW2 and PW8, who dealt with them, when the two witnesses were testifying. In the case of **Joseph Mulenga & Ors v. The People**[12] it was stated that-

> **During trial parties have the opportunity to challenge evidence by cross-examining witnesses. Cross-examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial.**

In the foregoing circumstances the explanations given by the two appellants could not have been true and the Court below was entitled to find that the two appellants were in possession of the stolen vehicle. Further, the fact that the two number plates belonging to the Toyota Sprinter were found in the stolen Toyota Corolla provided fertile ground for drawing the inference that the two persons found in that car knew about or were participants in the offences committed at Nakonde.

Regarding the arguments that there was dereliction of duty by the police in not conducting a test for finger prints on the recovered items as well as securing the MTN printout which could have assisted in tracking the robbers through the phone number of the person who called the deceased for the booking, we agree with the submission. But we do not agree with the submission that such dereliction was fatal to the prosecution's case. Our finding that the 1st and 2nd appellants participated in or knew about the offences upsets any prejudice that the two appellants may have suffered as held in the cases of **Peter Yotamu Hamenda v The People**[2] and **Felix Silungwe & Another v The People**[10].

Turning to the 3rd appellant, the evidence of PW8 that he was implicated by the 2nd appellant was supported by the fact that police who did not know the 3rd appellant's home actually located him. Not only that, a cell phone identified by PW7 as belonging to the deceased was found in his house. These are odd coincidences which amounted to something more. Here, we emphasize that the evidence that the 2nd appellant implicated the 3rd appellant came from a prosecution witness (PW8) and not the 2nd appellant. The issue had to be resolved

in relation to the credibility of the prosecution witness and not looking for corroboration applicable to accomplices. The trial court, however, correctly rejected the 3rd appellant's explanation.

It was contended by Mrs Marebesa that PW5 did not properly establish that the motor vehicle was his given the inconsistency between the statement he had given to the police which was produced in court that the vehicle was dark green and his evidence in Court that it was in fact grey in colour. We agree with the learned Legal Aid Counsel and note that the discrepancies in the witness's evidence which the prosecution made no effort to resolve made him unreliable in so far as establishing his ownership of the vehicle recovered in Tunduma was concerned. The defining question, however, is whether the said vehicle was stolen from the late Mr Sinkala.

PW6 who had given the vehicle to the deceased to use on the fateful night went to the police station at Nakonde to see the vehicle which PW2 had collected from Tunduma. He identified it as the one that he had given the deceased. He also said that the vehicle belonged to PW5. At the trial the witness identified the same vehicle. This evidence of PW6 was not challenged. Given this evidence, PW5's

explanation that he was not good at colours because of his lack of education makes some sense. From the foregoing it is clear that the vehicle that was stolen from the deceased belonged to PW5.

Indeed considered as a whole, the circumstantial evidence adduced by the prosecution, notwithstanding the failure to call Sergeant Bajo of Tanzania Police, the failure to lift finger prints and the failure to produce the MTN printout pertaining to the deceased's caller's phone, was so cogent that it could only allow the one inference that the three appellants committed the offences of aggravated robbery and murder. This appeal has failed to displace the conclusion reached by the Court below that the three appellants committed the offences charged of murder and aggravated robbery. For the reasons that we have given, we find no merit in the appeal and uphold the convictions as well as the sentences. We dismiss the appeal.

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**E.N.C. MUYOVWE**
**SUPREME COURT JUDGE**

.....
**E.M. HAMAUNDU**
**SUPREME COURT JUDGE**

.....
**J. CHINYAMA**
**SUPREME COURT JUDGE**