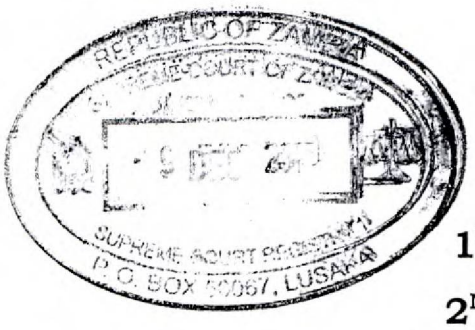
APPEAL NO. 141,142/2009

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CRIMINAL JURISDICTION)



BETWEEN:

TANASHO CHABU **1ST APPELLANT**

PYTHIAS MWANSA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd December, 2019 and 9th December, 2019

For the Appellants	:	Mrs S.C. Lukwesa, Senior Legal Aid Counsel
For the State	:	Mr S. Simwaka, Senior State Advocate

JUDGMENT

Hamaundu, JS delivered the Judgment of the court

Cases referred to:

1. **Boniface Chanda Chola and Others V The People (1988 – 1989) ZR 163**
2. **Musupi v The People (1978) ZR 271**

3. **Choka v The People (1978) ZR 243**
4. **David Zulu v The People (1977) ZR 151**
5. **Mwambona v The People (1978) ZR (reprint) 38**
6. **Bwalya v The People (1995/1997) ZR 168**

Legislation referred to:
The Supreme Court of Zambia Act, Chapter 25 of the **Laws of Zambia**

The appellants appeal against their conviction for the murder of Evans Mulenga, also known as Collins Mulenga, whom we shall hereafter refer to as the deceased.

The appellants were charged with the offence of murder contrary to **section 200** of the **Penal Code**, **Chapter 87** of the **Laws of Zambia**, on the allegation that on a date unknown but between the 25th and 31st day of March 2012 the duo killed the deceased. They appeared before the High Court, at a session held at Kasama on 11th August, 2014, presided over by Sikazwe J.

The facts that emerged at the trial were these: The appellants were residents of neighbouring homes, which were loosely referred to as villages, in Chinsali District. On 25th March, 2012, which appears to have been a Sunday, in the morning, the two appellants, in the company of two other residents within the same area, that is

the deceased and a man named Kedrick Mutale, left their villages and went to another home, or village, known as Katema. This household was quite far. There, they met the owner of the home by the name of William Kapolyo who owed the 1st appellant and Kedrick Mutale some money regarding some piece work they had done for him. William Kapolyo also used to brew some local beer for sale at his home. Upon being paid the money, the four started drinking the local beer. This was now about 09:00 hours in the morning. In the late afternoon, there came a heavy downpour of rain which only stopped around 20:00 hours in the evening. Seeing that the appellants and their two friends had come from far; and that, because of the heavy downpour, the streams might be flooded, William Kapolyo offered them a place to sleep at his home. The two appellants declined the offer. Kedrick Mutale and another patron by the name of Chimfwembe Kalasa accepted the offer and spent the night at William Kapolyo's home. The following day, on a Monday, the appellants were seen at their homes. Kedrick Mutale came back later that day. However, there was no sign of the deceased. When the residents asked about his whereabouts, the two appellants said that they had left him at William Kapolyo's home, together with

Kedrick Mutale. The latter, on the other hand, said that the deceased had left together with the two appellants. On Tuesday, the 27th March, the residents mounted a search for the deceased. The two appellants and Kedrick Mutale participated in the search. The deceased could not be found that day. The search was continued on Wednesday, the 28th March. On this day, the residents lost their patience with the trio. So, they handed them over to the local community crime prevention unit who in turn handed them over to the police. The search proceeded into the next day, Thursday 29th March. On this day, the body of the deceased was found in an area on the outskirts of a village known as Lwimbanshila. The police were informed. Detective Inspector George Nkamba, (PW4) who was dealing with the case led a team of police officers to the scene. Since the body was in a decomposed state, he advised the relatives to bury the deceased right there at the scene; with the intention that he be exhumed later for postmortem. The body itself had bruises on the ribs and the hands were tied at the back. In the meantime, upon a brief interview with the three suspects, the police decided to widen the scope of their inquiries; they apprehended William Kapolyo and Chimfwembe Kalasa. A few days later, however,

William Kapolyo, Chimfwembe Kalasa and Kedrick Mutale were released. The two appellants were the only ones left in custody. William Kapolyo and Kedrick Mutale were later called as witnesses PW1 and PW2 respectively.

The day that followed, the appellants and the police visited three places; William Kapolyo's home, the place at which the deceased was found and buried, and another place. Thereafter, the appellants were charged for this offence.

During trial, there was an attempt by the prosecution, through Detective Inspector Nkamba, PW4, to produce confession statements allegedly made by the appellants. After a trial-within-a-trial, the learned judge refused to admit the statements in evidence. The prosecution then focused their attention on the evidence of leading. In this regard, Detective Inspector Nkamba narrated to the court how, a day after the other suspects were released, the two appellants led him to the place where the body was found (a place that the officer had been to before), William Kapolyo's house (a place which was well known to the residents) and a third place. It seems both the prosecution and the defence were very much alive to

the case of **Boniface Chanda Chola and Others V The People**[1] where we held:

> **"The leading by an accused of the police to a place they already know and where no real evidence or fresh evidence is uncovered cannot be regarded as a reliable and solid foundation on which to draw an inference of guilt"**

So, the emphasis of Detective Inspector Nkamba's testimony on this issue was not on the alleged leading to the place where the body was found or William Kapolyo's homestead where the appellants had been drinking from, but on the leading to the third place. According to Detective Inspector Nkamba, there were marks of a struggle that had taken place a few metres off the path which the appellants had been walking on. He said that neither he nor any of the residents had been previously aware of this particular spot; and that it was only the two appellants who knew of it. He went on to say that that place was completely in the opposite direction from where the body was found. He then said that from there the appellants showed the police the route which they had taken to go and dump the body.

The appellants, in their defence, also focused on the evidence of leading. They insisted that it was Detective Inspector Nkamba

who took them to all the three places. They said that, in fact, the place which was said to have struggle marks was the place where the search party had camped and rested during the search for the deceased.

In his judgment, the learned judge completely overlooked the very crucial evidence of leading and, instead, resolved the case on the basis of credibility and demeanor of witnesses. The judge believed the testimony of Kedrick Mutale (PW1) and Willam Kapolyo (PW2) that during the drink-up, the 1st appellant had picked up a quarrel with the deceased, which only ended by the intervention of William Kapolyo. He also believed their testimony that the deceased left together with the two appellants. As for the appellants' testimonies, the judge stated that they were full of inconsistences and untruthfulness. He further stated that he was not impressed with their demeanour. Having chosen the prosecution's version of what transpired, the judge felt satisfied that the same had established an inference of guilt against both appellants. He convicted them of the offence.

As for the sentence, he found as a fact that the two appellants had been drinking beer from 09:00 hours until 20:00 hours. In the

judge's view, the appellants were labouring under the influence of alcohol when they committed the offence. For that reason, he found extenuating circumstances in the case and sentenced them to 25 years imprisonment each. Hence this appeal.

The appellants put forward only one ground of appeal. It states:

> **"The trial court erred in law and fact when it found the appellants guilty of murder based on circumstantial evidence which is not sufficient to warrant only an inference of guilt".**

The prosecution do not support the conviction. For that reason we will focus only on the areas on which the two sides are on common ground in finding fault with the judgment of the court below. In any case, they are the only pertinent areas in this case.

In the first area, the appellants attack the manner in which the learned judge relied on the evidence, or testimony, of PW1, Kedrick Mulenga and PW2, William Kapolyo, that is, merely on the strength of their credibility and the plausibility of their testimony. Counsel for the appellant, Mrs Lukwesa, argued at the hearing that the learned judge should have approached the testimony of the two witnesses with a lot of caution as these witnesses had possible

interests of their own to serve. She pointed out that the witnesses had also been detained in connection with the same offence; a fact which raised a strong possibility that they could have a motive to falsely implicate the appellants. To support that argument, learned counsel quoted our decision in the case of **Musupi v The People**[2], one of the leading authorities on this subject.

On the strength of the same case, Mr Simwaka, the learned Senior State Advocate agreed with the argument by Mrs Lukwesa and relied on a further authority in the form of our decision in the case of **Choka v The People**[3]; this was a decision which we made in the same year as the **Musupi** case, but a little earlier in that year.

The second, and only other major, area is the evidence of leading by the appellants to the three places. Mrs Lukwesa addressed the evidence by the arresting officer, PW4, that the appellants had led the police to a third place where marks of a struggle were observed. According to Mrs Lukwesa, the appellants had explained that they had led the police to the third place in order to show them where the search party had last rested. Counsel argued that there was no direct evidence to connect the place to the

deceased's death, especially that nothing was recovered by the police at that place at all. She dismissed the evidence that there were struggle marks as being of no consequence because, in her view, it was not possible to distinguish beyond all reasonable doubt whether the disturbance that was observed was made by the alleged struggle or by the activities of the search group that had rested at the place.

As for the evidence that the appellants had led the police to the place where the body had been found, counsel stated that this piece of evidence, too, was of no consequence because the police had already been to that place and nothing new was recovered when the police went back there with the appellants.

On this point, as well, Mr Simwaka, for the State, agreed with counsel for the appellant. He dwelt generally on the principle that if the police have already been to a particular place, the subsequent leading by an accused person to that place is of no value unless something new is uncovered on the subsequent occasion. He relied on the case of **Boniface Chanda Chola & two Others v The People**[1] whose decision we have quoted.

In conclusion, Mrs Lukwesa submitted that the testimony of PW1 and PW2 was that the deceased had left the drinking place in the company of the two appellants; that the two witnesses being witnesses with an interest to serve, that testimony should not have been admitted into evidence without corroboration, and, consequently, ought to have been excluded. She further submitted that the evidence of leading ought to have been discounted, as well, on account of its low value. She then argued that when these pieces of evidence are excluded, the circumstantial evidence that remains fails to meet the test set out in the case of **David Zulu v The People**[4] , namely that for a conviction on circumstantial evidence to be sound at law, such evidence should reach such high level of cogency as to permit only an inference of guilt.

That is a conclusion which was shared by Mr Simwaka, for the State; and on which both counsel would like us to quash the conviction of the appellants.

The following is our position. As regards the treatment of the testimony of PW1 and PW2, we, without hesitation, agree with the contention by both sides that looking at the circumstances surrounding the case the two witnesses were suspect witnesses,

and, therefore, had possible interests of their own to serve. Indeed in the case of **Choka v The People**[3] cited by the State, as in many others, we held:

> **"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 demeanor 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".**

As we have shown in our recount of what transpired in the court below, the learned judge did not warn himself as to the danger that was inherent in relying on that testimony: Consequently, he did not look for anything more to satisfy himself that that danger was not present. That was a misdirection which, as the predecessor to this court (the Court of Appeal) said in **Mwambona v The People**[5], could result in the conviction being quashed unless this court can apply the proviso. The proviso is that part in **Section 15** of the **Supreme Court of Zambia Act, Chapter 25** of the **Laws of Zambia** which permits this court to dismiss an

appeal, notwithstanding that a point raised by an appellant has succeeded, if no miscarriage of justice has occurred.

We now move to the evidence of leading by the appellants. We have stated in our recount that the leading was with respect to three places, namely; the place where the deceased's body had been found, the place at which the group had been drinking beer and, finally, the place where struggle marks were observed.

We agree with the arguments by both sides as regards the 1st two places, that is that the principle we stated in the case of **Boniface Chanda Chola and two others v The People**[1] applies to them: Indeed, the police had already been to the place where the body had been found, and, as argued by counsel for the appellant, nothing new was discovered on the subsequent visit. The place at which the group had been drinking, similarly, was a place which was well known to people, being the home of PW2. Again nothing new was discovered on the subsequent visit.

We are however not inclined to agree with the argument that the evidence regarding the leading to the third place should suffer the same fate. Mrs Lukwesa has dismissed the finding of struggle marks at the third place as being of no significance because the

appellants had explained that that place was the site where the search party for the deceased had rested during the search. We must disagree with counsel on this point. First of all, struggle marks signify there having been a struggle. The kind of footprints or other marks left by a group that is merely gathered cannot be described as struggle marks. Secondly, PW4, the arresting officer, gave very clear evidence that the appellants led him along the route which they had taken on their way home, up to a place where they pointed out the struggle marks. The witness said that these marks were not on the path; but a few meters off the path, in the bush. Even in cross-examination, the witness was firm in his insistence that he had never been to that place and that even though other people used to use the path which the appellants had taken on their way home, the struggle marks themselves were off the path, in the part of the bush which other people were not ordinarily using; hence, it was not a place that was generally known to other people.

In our view, the leading to the place where the appellants pointed at struggle marks produced fresh evidence in that it introduced for the first time the possible place where the actual killing took place. With that evidence, there was no reason not to

believe PW4 when he continued in his testimony that, from that point, the appellants continued showing the police the route which they took to go and dump the deceased's body; which incidentally was in a direction opposite from the route that they had taken to go home. Again, this was not a route which anybody else knew because the people in the area only knew the final place where the body was found. Nobody else knew how the body got there.

Therefore, this was evidence on which a court could draw an inference of guilt on the part of the appellants. The same evidence had the effect of corroborating the testimony of PW1 and PW2; so that their testimony that the deceased left in the company of the appellants could now be believed. The two pieces of evidence, put together, formed circumstantial evidence which had reached such a level of cogency that it permitted only an inference of guilt. We believe that, had the learned judge approached the case in this manner, he would still have convicted the appellants. On those grounds, notwithstanding that the learned judge had misdirected himself in the manner in which he accepted the testimony of PW1 and PW2, we will nevertheless dismiss the appeal because no miscarriage of justice has occurred.

We have some views regarding the sentence. The learned judge declined to impose the mandatory death sentence for the offence of murder on the ground that the fact that the appellants had been drinking beer from morning till evening constituted extenuating circumstances. Indeed, we have held that drunken circumstances generally attending upon the occasion where the death occurs may sufficiently reduce the amount of moral culpability which in itself is an extenuating cirmumstance. However, we think that the conduct of an accused in those drunken circumstances should reflect some impairment in terms of reasoning; and, least, his action must reflect some impulsiveness which is a result of the impaired reasoning. In **Bwalya v The People**[6], for example, where we applied such extenuating circumstances, the appellant had hit his victim spontaneously during the quarrel; and right at the scene where the drunken circumstances were prevailing. In this case, however, the appellants had started off for home. We will never know what triggered the killing of the deceased, but after the killing the appellants had enough presence of mind to take the body in a different direction and dump it there, in order to cover their tracks. We do not think that such conduct is reflective of the impaired

reasoning that is associated with drunkenness. Hence we do not consider that there were extenuating circumstances in this case. Consequently, we set aside the sentence of 25 years imposed by the trial judge. In substitution therefor we impose the mandatory sentence prescribed for murder which has no extenuating circumstances. We sentence both appellants to death.

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E.N.C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE