IN THE SUPREME COURT OF ZAMBIA Appeal No. 135, 136/2018
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

JAIRY LUPIYA **1ST APPELLANT**

MAIMBO CHALI KOMBE **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Muyovwe, Hamaundu and Chinyama, JJS**
on 3rd December, 2019 and 9th December, 2019

For the Appellant: Mrs. M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. S. Simwaka, Senior State Advocate, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **David Zulu vs. The People (1977) Z.R. 151**
2. **Mugala vs. The People(1975) Z.R. 282**
3. **Chisha vs. The People (1980) Z.R. 36**
4. **Ilunga Kalaba vs. The People (1981) Z.R. 102.**

5. **Machipisha Kombe vs. The People (2009) Z.R. 282**
6. **Mbinga Nyambe V The People (S.C.Z. Judgment No. 5 of 2011)**
7. **Khupe Kafunda vs. The People (2005) Z.R. 31**
8. **Patrick Sakala vs. The People (1980) Z.R. 205**

This is an appeal against the judgment of the High Court sitting at Kasama. The judgment was delivered by Hon. Mr. Justice Siavwapa on the 17th October, 2011. The appellants were convicted on two counts: aggravated robbery and murder contrary to Section 294(1) and 200 of the Penal Code.

It is alleged that between 16th and 17th February 2011 at Mpulungu in the Northern Province of the Republic of Zambia, the appellants robbed Joshua Kalumbi of a motor vehicle and murdered him.

The brief facts were that PW2 owned a Toyota Corolla Registration Number ABR 9665. The vehicle was operating as an unregistered vehicle for transport hire commonly known locally as a pirate taxi driven by Joshua Kalumbi the deceased herein. According to PW3, a 15-year-old boy (who gave unsworn evidence after the court conducted a voire dire) the deceased was last seen on the evening of the 16th February, 2011 when he was hired by the

appellants (referred to in the court below as the dumb people). PW3 who knew the 1st appellant before stated that the deceased was hired to take the appellants to a place called GT. The deceased and the vehicle were reported missing on the 17th February, 2011. Investigations were instituted and, in the course of investigations it was discovered that the appellants were seen with the missing vehicle on the 17th February, 2011 around 17:00 hours at PW1's residence in Senga Hill in Mbala. Apparently, the 1st appellant was a friend of PW1's son who also had a speech and hearing impediment. She was not familiar with the 2nd appellant. PW1 left for the market only to return at 19:00 hours to find the appellants and the vehicle had left her home.

The following day, around 04:00 hours PW1, a marketeer by profession, left for Mpulungu to buy goods for her business. She arrived around 06:30 hours and she overheard women discussing about two speech and hearing-impaired persons who had gone missing with a white vehicle. It was at this stage that PW1 revealed that she had seen the appellants with a white vehicle at her home in Senga Hill the previous day. She led the police and the owner of

the vehicle (PW2) to her home where they found information that the appellants had headed for Kasama. The investigation team followed to Kasama. PW2 used public transport and on the way, at a place called Nseluka in Kasama the missing vehicle was spotted parked at a certain house. PW2 was informed that the 1st appellant had left the vehicle and had gone by bicycle to charge the car-battery as it had a problem. The 1st appellant was apprehended immediately on return. The 2nd appellant was also apprehended in the same area at the roadside where he was apparently waiting for the 1st appellant. The appellants led the police to a swampy area in the direction of GT where the body of the deceased was recovered. There was evidence that the body of the deceased was swollen, had a wound on the forehead and the tongue was hanging. The arresting officer (PW5) stated that the 1st appellant was found in possession of the deceased's Motorola cell phone which was handed over to him by PW2 who apprehended the 1st appellant.

Both appellants elected to remain silent and did not call any witnesses.

The learned judge found that this case was anchored on circumstantial evidence as no one witnessed the robbery of the vehicle and murder of the deceased. However, the learned judge accepted the evidence of PW1 and PW3 that the appellants hired the vehicle the previous night and the following day, the vehicle was seen in the custody of the appellants by PW1. That it was the same vehicle that was found in Kasama at Nseluka where the appellants were apprehended from. The learned judge found that circumstantial evidence closely connected the appellants to the commission of the two counts. That there was no explanation as to how the appellants got possession of the vehicle and the only reasonable conclusion was that they got it from the deceased by force. The appellants were convicted in both counts. In the first count, each was sentenced to 15 years imprisonment with hard labour while in the second count, each was sentenced to death.

On behalf of the appellants, Mrs. Liswaniso advanced two grounds of appeal as follows:

1. **The learned trial judge erred in law and fact when he found that the appellants took control of the car from the deceased by use of force**

in terms of Section 294 (1) of the Penal Code thereby committing the offence of aggravated robbery and murder.

2. **The learned trial judge erred in law and fact when he found that the circumstantial evidence was so compelling that the only irresistible inference to be drawn from it is that of guilt.**

Counsel for the appellant relied on her filed heads of argument and she made a brief augmentation of her arguments. We note that the arguments in the two grounds of appeal are interrelated and we will examine the arguments together to avoid repetition.

In sum, Mrs. Liswaniso relying on the case of **David Zulu vs. The People**[1] submitted that this case is anchored on circumstantial evidence as no one saw the appellants attack the deceased and rob him of the vehicle. According to Counsel, it can also be inferred that the deceased was killed by unknown people who later dumped his body where it was found. It was submitted, *inter alia*, that there was no evidence that the appellants had control of the vehicle in issue; that they attacked the deceased, got his car and killed him. Counsel cited the cases of **Mugala vs. The People**[2] where it was held that:

To prove a charge of aggravated robbery in terms of Section 294(1) of the Penal Code, it is necessary for the prosecution to show that violence was used in order to obtain or retain the thing stolen.

Mrs. Liswaniso also alluded to the evidence of PW3 which according to her submission required corroboration in line with the case of **Chisha vs. The People.**[3]

Counsel took issue with the fact that there appeared to have been no sign language interpreter at the time that the appellants allegedly led the police to the scene where the body of the deceased was found. Mrs. Liswaniso pointed out that there is no record of how the appellants communicated with the police at this time. In this regard, Mrs. Liswaniso submitted that it would only be fair to conclude that the police officers were responsible for the discovery of the body of the deceased.

Coming to the issue of the deceased's mobile phone which was allegedly recovered from the 1st appellant, Mrs. Liswaniso submitted that the evidence of the arresting officer was to the effect that PW2 recovered the deceased's phone from the 1st appellant yet in his evidence, PW2 did not testify to that effect. It was submitted that it

is, therefore, safe to conclude that the police tried to falsely link the appellants to the commission of the two counts.

Further, Counsel submitted that the vehicle in issue was not found in possession of the 1st appellant as it was parked at a house and the owner of the house was not called as a witness to confirm that it was the 1st appellant who parked the vehicle at the house.

In response, Mr. Simwaka relied on his filed heads and augmented briefly. Mr. Simwaka submitted that there were odd coincidences in this case: That PW1 saw the appellants in possession of the vehicle parked at her house in the absence of the deceased; the vehicle was recovered from Nseluka where the appellants were also apprehended from; and there was no legitimate explanation as to how the appellants got the vehicle from the deceased. On this argument, Counsel relied on the case of **Ilunga Kalaba and Another vs. The People**[4] and **Machipisha Kombe vs. The People**[5] where we held that odd coincidences constitute evidence of something more. Counsel argued that the odd coincidences were unexplained which amounted to something more. That the trial court arrived at the right conclusion when he

drew the inference that the appellants took control of the vehicle from the deceased by use of force especially that the vehicle had blood stains in the boot.

On the issue of circumstantial evidence, Mr. Simwaka argued that the evidence was cogent as to permit only an inference of guilt on the part of the appellants.

With regard to the issue of the absence of a sign language interpreter at the time that the appellants allegedly led the police to the discovery of the body of the deceased, Mr. Simwaka invited us to take judicial notice that in the community basic signs are used for communication.

Mr. Simwaka contended that even if PW3's evidence and evidence of leading was discounted, there was overwhelming circumstantial evidence that permits only on inference of guilt. Counsel reiterated that the evidence is cogent to sustain a conviction.

In reply, Mrs. Liswaniso submitted that if PW3's evidence and that of leading is discounted, what remains is not sufficient to warrant the inference that the appellants committed the offence.

She maintained that the vehicle was not in possession of the appellants as it was parked at a house whose owner should have been called as a witness.

During the hearing of this appeal, we took Mr. Simwaka to task over the reliance by the trial court on the evidence of PW3 the 15-year-old star witness who gave unsworn evidence after the learned trial judge conducted a *voire dire*. In this case, the trial judge ruled that PW3 lacked sufficient intelligence to give evidence on oath. Section 122 of the Juveniles Act states that:

> **122. Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth:**
>
> **Provided that-**
>
> **(a) if, in the opinion of the court, the child is not possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and does not understand the duty of speaking the truth, the court shall not receive the evidence; and**
>
> **(b) where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that**

evidence is corroborated by some other material evidence in support thereof implicating the accused.

The above Section is clear that a *voire dire* must be conducted before a trial court receives evidence from a child below the age of 14 years. If a child witness is 14 years and above, it is not necessary to conduct a *voire dire,* as such a child is permitted to give evidence on the same footing as an adult. In this case, the learned trial judge erred when he subjected PW3 who was 15 years old to a *voire dire.* The learned trial judge, it appears, applied the law which was applicable before the amendment to Section 122 of the Juveniles Act which allowed the reception of unsworn evidence. After 12th April, 2011 when the amendment took effect, there is no room for the unsworn evidence of a child.

Having made the above observations, the result is that the evidence of PW3 must be discounted as it was received and relied upon in error by the trial court.

We now wish to deal with Mrs. Liswaniso's concern that at the time when the appellants were leading the police to the discovery of the body, there was no sign language interpreter present to guide

them. We cannot accept Mr. Simwaka's submission that we take judicial notice that in our communities people use basic sign language to communicate with the speech and hearing-impaired. We agree with Mrs. Liswaniso that the presence of a sign language interpreter at that stage was crucial and the absence of a sign language interpreter must work in favour of the appellants. Therefore, evidence of alleged leading by the appellants to where the body of the deceased was found is also discounted.

Mrs. Liswaniso also raised the issue regarding the deceased's phone which according to the arresting officer was found on the person of the 1st appellant by PW2 who apprehended him. As pointed out by Mrs. Liswaniso, PW2 made no mention of finding the deceased's phone on the person of the 1st appellant. PW2 stated that after he apprehended the 1st appellant, he sought instructions from the police, and he was advised to handcuff him while waiting for their arrival. For this reason, the learned trial judge should have rejected the evidence that PW2 recovered the deceased's phone from the 1st appellant.

The question that remains for us to determine is whether the appellants' conviction can stand in the absence of PW3's evidence which without a doubt, strongly connected the appellants to the offence as they were the last persons seen with the deceased driving the vehicle in question. Mrs. Liswaniso urged us to acquit her clients while Mr. Simwaka contended that there is sufficient circumstantial evidence to sustain the conviction.

As stated earlier, we agree that this case is anchored on circumstantial evidence. We are mindful that in order to sustain a conviction, circumstantial evidence must be cogent and permit only an inference of guilt. In the case of **Mbinga Nyambe V The People**[6] we held, *inter alia*, that:

1. **Circumstantial evidence or indirect evidence is evidence from which the judge may, infer the existence of the fact directly.**
2. **It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue, but rather is proof of facts not in issue. But relevant to the facts in issue and from which an inference of the fact in issue may, be drawn.**
3. **A trial judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture, so that it attains such a degree of cogency which can permit only an inference of guilt.**

In this case, there was no eye witness to the murder of the deceased and robbery of his vehicle. Therefore, it is crucial that circumstantial evidence must be cogent to permit only an inference of guilt. In the case of **Khupe Kafunda vs. The People**[7] we held, *inter alia*, that:

> **1. There was no direct evidence and no eye witness to the incident that led to the death of the deceased. However, the circumstantial evidence was so overwhelming and strongly connected the appellant to the commission of the offence.**

The record shows that PW1 stated that she found the appellants at her home with the vehicle which was ordinarily being driven by the deceased. When she returned from the market, she did not find the vehicle and the appellants. She left at 04:00 hours the following morning for Mpulungu where she found the story that the appellants had disappeared the previous day with a white vehicle. This evidence is in tandem with that of PW2 the owner of the vehicle that the deceased disappeared the previous day in Mpulungu with the vehicle which was found in possession of the appellants in Senga Hill in Mbala.

As investigations continued, the vehicle which was ordinarily driven by the deceased was found at Nseluka in Kasama where the 1st appellant was apprehended from and the 2nd appellant was apprehended in the same area. The argument by Mrs. Liswaniso that the owner of the house where the vehicle was found parked should have been called though valid cannot negate the fact that PW2 the owner of the vehicle was adamant that the 1st appellant arrived at the house with the car-battery which he had gone to charge. The fact that the 1st appellant had gone to the extent of charging the battery of the vehicle leads to the conclusion that he had custody of the vehicle as stated by PW2 and in any case, the learned trial judge rightly accepted PW1's evidence that he and his co-accused were in possession of the vehicle the previous evening in Senga Hill. PW1 knew the 1st appellant very well as she had kept him at her house and as far as she knew, he did not own a vehicle.

The vehicle in issue was examined by the police and blood stains were discovered in the boot of the vehicle. More importantly, the driver of the vehicle which was found in possession of the

appellants was found dead. The argument by Mrs. Liswaniso that there was no evidence that violence was used in the robbery is an argument in futility. The blood stains in the boot and the finding of the body of the deceased who ordinarily drove the vehicle was more than sufficient evidence that the perpetrators of the robbery had used violence to obtain it from him.

Further, the evidence reveals that the vehicle which was ordinarily driven by the deceased was found in the possession of the appellants shortly after he went missing. This can only lead to one inference that the appellants are the ones who killed the deceased and robbed him of the vehicle. This is more so that the appellants, although remaining silent was their constitutional right, did not offer any explanation as to how they came to be in possession of the vehicle.

We take the view that in this case, the circumstantial evidence was so overwhelming permitting only an inference of guilt on the part of the appellants.

In the premises we find that this appeal has no merit. We uphold the conviction and sentence by the lower court. The appeal is dismissed accordingly.

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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