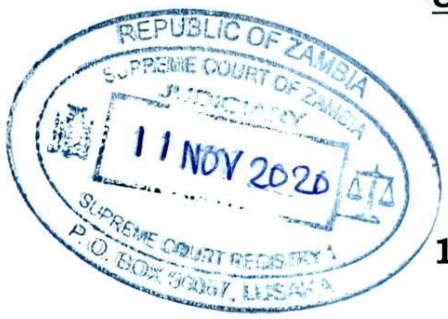
IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

SCZ APPEAL NO. 80, 81 OF 2020



(Criminal Jurisdiction)

BETWEEN:

MUBANGA KASELO — **1ST APPELLANT**

ANOLD CHINDUMBA MUZALA — **2ND APPELLANT**

AND

THE PEOPLE — **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd November , 2020 and 11th November, 2020

APPEARANCES:

For the Appellant: *Ms E. I. Banda, Senior Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mr C. K. Sakala with Mrs S. C. Kachaka, State Advocates, National Prosecutions Authority*

J U D G M E N T

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

Cases referred to:

1. **Uganda v Yowana Baptist Kabandize (1982) HCB 93**
2. **Remigious Kiwanuka v Uganda, Criminal Appeal No. 41 (1995)**
3. **David Zulu v The People (1977) Z.R. 150**
4. **Dorothy Mutale and Another v The People (1976) Z.R. 51**
5. **Phiri and Others v the People (1973) Z.R. 47**

6. **Felix Muleba and Sharon Muleba v The People, Appeal Nos. 23 and 24 of 2004 (Unreported)**
7. **David Dimuna v The People (1988-1989) Z.R. 119**
8. **Dickson Sembauke Changwe v The People (1988-1989) Z.R. 144**
9. **Simutenda v The People (1975) Z.R. 294**
10. **Timothy Chakolwa Mulonda v The People (1978) Z.R. 351**
11. **George Nswana v The People (1988-1989) Z.R. 174**
12. **Maseka v The People (1972) Z.R. 9**
13. **Winfred Sakala v The People (1987) Z.R. 23**
14. **Mutambo and 5 Others v The People (1965) Z.R. 24**
15. **Subramaniam v Public Prosecutor [1986] 1 WLR 965**
16. **Maketo and 7 Others v The People (1979) Z.R. 23**
17. **Ivor Ndakala v The People (1980) Z.R. 180**

The two appellants were convicted by Kondolo J as he then was, in the Mongu High Court for the offences of Murder and Aggravated Robbery relating to the killing of the 2nd appellant's father, Jonas Ndandumuna Muzala (the deceased) who was shot dead at his village in Sesheke and had his 6 head of cattle stolen in the night of 9th February, 2015. For chronological orderliness, we will deal first with the case relating to the 2nd appellant before moving on to the 1st appellant.

The evidence relied on by the prosecution in support of their case against the 2nd appellant comprised circumstantial evidence given by the appellant's mother, Jane Musenge who was PW1; his nephew, Chiweza Muzala who was PW2; and his brother in law,

Kwambwa Masamu who was PW3. The sum of the evidence from these witnesses was that the appellant had returned to his father's village on 9th February, 2015 from a mission in which he had gone to look for a wife for himself, according to what he told his parents. In the evening after narrating to his parents the success of his journey, he announced that he was going to sleep as he was tired.

As the 2nd appellant was going away, there were two gunshots and the deceased was hit and died instantly. PW1 who had dropped from her seat to the ground begun calling after the 2nd appellant but the 2nd appellant did not return. The witness as well as PW2 and PW3 from where they were in their houses heard the sound of feet they assumed to be the 2nd appellant's running away towards the kraal.

The next day, 10th February, 2015 it was discovered that 6 head of cattle out of eight were missing from the deceased's kraal. One cow and its calf were found in the field near the kraal. The 2nd appellant only re-appeared around 10:00 hours according to PW1 and 14:00 hours according to PW2. He explained upon being asked as to where he had been that he had gone to inform people around

the villages about the demise of his father. PW1 wondered how this could be when he had not even seen his father die. She explained that the relationship between the 2nd appellant and his father had not been that good and gave an instance when the 2nd appellant had threatened the deceased with a knife after the deceased refused to give him cattle that he had demanded. The 2nd appellant was later arrested and charged on suspicion that his behaviour indicated that he was involved in the killing of his father and the theft of the animals.

The 2nd appellant did not give any evidence electing to remain silent as he was perfectly entitled to do. This was the evidence relevant to the 2nd appellant's case.

In his judgment relating to the 2nd appellant, the learned trial judge took note of PW1's evidence that the 2nd appellant never used to see eye to eye with his father; that at one time he threatened his father with a knife over his cattle; that the deceased was killed the same day of the 2nd appellant's returning home and within moments of leaving his parents; that he ran away ignoring his mother's call for help; that he ran in the direction of the kraal; that the next day 6

head of cattle were found missing. The learned judge found the circumstances in which the deceased was shot and the behaviour of the 2nd appellant as pointing to his involvement in the crimes. He relied on the two Ugandan cases of **Uganda v Yowana Baptist Kabandize**[1] and **Remigious Kiwanuka v Uganda**[2] which respectively settled the principle that running away from the scene of crime showed a guilty mind and that the disappearance of an accused person from the area of a crime soon after the incident may provide corroboration to other evidence that he has committed the offence.

The learned judge was of the view that the evidence against the 2nd appellant pointed to the fact that he was part of a conspiracy to murder his father and knew what was going to happen that night, hence his running away.

The 2nd appellant is dissatisfied with the conviction and has put up one ground of appeal as follows-

> **The learned trial judge erred in law and fact by convicting the 2nd appellant based on circumstantial evidence when it was clear that there was more than one reasonable inference which could be drawn from the said circumstantial evidence.**

In support of this ground, it was submitted by Ms Banda, in her written heads of argument and oral submissions, that the circumstantial evidence pertaining to this appellant's behaviour in failing to heed his mother's distress call cannot lead to the only inference that he committed the offence so as to satisfy the guidance provided in the case of **David Zulu v The People**[3] that for an inference of guilt to be drawn, the circumstantial evidence must have taken the case out of the "*realm of conjecture*" and attained a degree of cogency that permits only an inference of guilt. This, notwithstanding the 2nd appellant had elected to remain silent and did not call any witnesses. Learned Counsel submitted that there are several inferences open to the court below, namely (1) that the 2nd appellant ran away because he was scared; (2) that he ran to the kraal to steal the cattle since he wanted, according to his mother, to sell them previously; (3) that he was a coward who didn't want to be emasculated by admitting before friends and family that he simply ran away; (4) that he ran away because he organized people to kill his father. It was learned Counsel's view that the Court below should have adopted an inference most favourable to the 2nd appellant in line

with the principle in the case of **Dorothy Mutale and Another v The People[4].**

Our attention was drawn to the Court of Appeal (forerunner to the Supreme Court) decision in **Phiri and Others v The People[5]** that:

> **"The Courts are required to act on the evidence placed before them. If there are any gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused. If there is insufficient evidence to justify a conviction the courts have no option but to acquit the accused".**

It was submitted that there was no evidence whatsoever that warranted the conviction of the 2nd appellant. Counsel's prayer was that we allow the appeal, quash the conviction and acquit the 2nd appellant.

In response to the 2nd appellant's submissions, it was argued by Mrs Kachaka in the State's written heads of argument and orally that the conduct of the 2nd appellant in disappearing from the village immediately his father was shot dead and running towards the kraal where animals were later found to have been stolen leaves only one reasonable inference as found by the trial court. It was countered that a reasonable reaction expected of the 2nd appellant after his father was shot was to go back especially after his aged mother called

him. The fact that he instead ran away towards the kraal created the inference that the 2nd appellant had conspired with those who killed his father so that they together could steal the animals especially in view of his threats once upon a time to his father over the animals. It was submitted that the behaviour of the 2nd appellant was not consistent with innocence. We were referred to the case of **Felix Muleba and Sharon Muleba v The People**[6] in which, based on the couple's conduct, this Court drew an inference of guilt from the fact that the appellants hurriedly moved from their home shortly after their maid was murdered. It was also pointed out that the decision by the 2nd appellant to remain silent in the face of the strong accusation left questions unanswered and the court was left only with the evidence of the State. The case of **David Dimuna v The People**[7] was cited in which this court held that:

> **"Whilst a court must not hold the fact that an accused remains silent against him there is no impropriety in a comment that only the prosecution evidence was available to the court".**

It was accordingly submitted that in the present case, the appellant exercised his right to remain silent which should not be held against him but the fact remains that the trial court only had

evidence from the prosecution which brought out an inference of guilt against him. It was submitted, therefore, that the prosecution had circumstantially proved its case against the 2nd appellant and the court was entitled to convict him. We were urged to uphold the conviction and dismiss the appeal.

We have considered the ground of appeal by the 2nd appellant, the evidence in the court below, the judgment of the trial court and the submissions made by learned Counsel before us. It is not in dispute that the deceased was shot dead while at his home in the night of 9th February, 2015 and 6 head of cattle were stolen from his kraal. It is also not in dispute that the shooting took place shortly after the 2nd appellant left his parent's presence but was within ear reach of his mother as she called for help. The 2nd appellant did not go back. It has been suggested on behalf of the 2nd appellant, in terms of inferences favouring him, that he might have gotten scared after the shooting of his father or that he was a coward who feared to be laughed at by friends and relatives as being less of a man; that this should account for his behavior that fateful night, as we understood Ms Banda. For the State's part, Mrs. Kachaka's position

is that taking into account the behavior of the 2nd appellant on the fateful night and the following morning when he showed up during the day, there was only one reasonable inference that could be made, that of the 2nd appellant's guilt. It was stated that his conduct was not consistent with innocence and his decision to remain silent in the face of strong accusation begged for answers as the court only had evidence from the State and could not speculate as to what really happened.

It is clear from the judgment of the trial court that the court had made findings of fact which it regarded as giving rise to a credible circumstantial case. Indeed the court below only had the evidence of the prosecution to go by, the appellant having elected to remain silent as he was entitled to do. As held by this court in the case of **Dickson Sembauke Changwe v The People[8],** among other things, where an accused elects to remain silent, which he is entitled to do and should not be held against him, the prosecution still has to prove its case. If the case is founded on circumstantial evidence, the evidence must lead only to one inference - the guilt of the accused

person. The inference to be drawn must be based on the evidence available as guided in cases such as **Simutenda v The People**[9].

Taking into account the findings made by the court below, we cannot speculate as to the possible inferences suggested by Ms. Banda that the 2nd appellant may have run away because he was scared or that he feared to be emasculated by friends and relatives (for running away) because there was no evidence that he was scared by the shooting or was gripped by fear. The Court's obligation is to draw proper inferences from the evidence available to it. In the case of **Timothy Chakolwa Mulonda v The People**[10], we observed to the effect that although the appellant had exercised his right to remain silent and to call no witnesses and the Court was not going to know why the appellant took the life of his friend, this would not deter the Court from drawing inferences that properly flowed from the evidence. As we have stated, we cannot speculate on the inferences proposed by Ms. Banda because there is no evidence on record that the 2nd appellant was scared or gripped by fear after the shooting. In any case, his explanation upon reappearing the following day, was

that he had gone informing villagers about the death of his father. So, the question of fear does not arise.

As his mother reacted, the 2nd appellant could not have known that his father was dead unless he was aware of a conspiracy to kill him which would then explain his strange and suspicious behaviour. The fact that he ran away and did not heed his mother was not challenged and as found by the trial court there was no reason why his biological mother could lie against him. We agree with Mrs. Kachaka that the 2nd appellant's behaviour was not consistent with innocent conduct. The fact that the 2nd appellant explained that he had gone to inform villagers about the death of his father also shows that he had prior knowledge that his father was going to be killed. On the foregoing accounts we are satisfied that the learned trial judge properly concluded that the circumstantial evidence was so cogent that it only left the one inference of guilt by the 2nd appellant. We, therefore, find no merit in the ground of appeal and we dismiss it. Consequently, we uphold the conviction of the 2nd appellant.

Turning to the 1st appellant, the evidence relied upon by the prosecution comprised implicatory statements made to witnesses by

other persons. The first statement was disclosed by PW4, Santamba Twaambo who was following the trail left by the stolen animals as well as the suspected footprints of the bandits on 12th February, 2015. According to PW4, the next day, they came upon one Lindonga Chinoya who informed them when they apprehended him, because of his suspicious conduct, that he had been taken, on the fateful night, by the 1st appellant and one person he only knew as Dee, on the pretext that they were going hunting and wanted him to help carry the meat but that they ended up at the deceased's village and Dee shot the deceased. Lindonga told his captors that he got scared with the turn of events and ran away. The judgment of the Court below shows that Lindonga was jointly charged with the appellants and one other person but got acquitted along with the other person.

The second statement was disclosed by PW5, Miki Singongi of Singongi village in Mwandi. This witness testified that on 10th February, 2015 he met Dee whose other name he knew as Liswaniso at Mwandi around 11:00 hours. Dee told him that he and another person whom Dee referred to as the old man who turned out to be

the 1st appellant had spent the night at PW5's village and that they were in possession of 6 head of cattle.

PW5 had heard rumours that cattle had gone missing in a village he did not know. While in the company of Dee he got a call from his sister who told him about the presence of police officers in their village. The witness told Dee to go with him to the police to verify that the cattle in their possession were not the rumoured missing ones. Dee then took him to the 1st appellant after which Dee escaped. PW5 took the 1st appellant to the police and the cattle were recovered from Singongi village.

There was evidence from PW6, Detective Inspector Kayowe Nangana of Sesheke Police that he did travel to Mwandi on the basis of a phone call received from Chief Inspector Sipatela, officer in charge at Mwandi Police Post that the 1st appellant had been apprehended with 6 head of cattle. Upon reaching there, he found the 1st appellant and the 6 head of cattle at Mwandi police post. PW6 also stated that the 1st appellant led police to Castor Singongi's house where, according to the witness, the 1st appellant and Dee had spent the night of (9th February, 2015 to) 10th February, 2015.

There was also evidence that PW3 did pick a spent cartridge near the deceased's home. PW6 also testified that he recovered a spent cartridge when he went to the scene of crime but there was no explanation whether this was the same one picked by PW3. The witness also stated that the 1st appellant led police to Castor Singogi's house where a shotgun with the name Armed was recovered.

Further evidence was that two spent cartridges and a Turkish made Armed shotgun were submitted to PW7, Senior Superintendent Stephen M. Zulu, a police forensic ballistics expert for examination on 2nd January, 2015. PW7 rejected one of the cartridges on the ground that it did not have a primer which should have aided him in establishing whether it was discharged from the firearm which PW6 stated to have recovered from Castor Singongi's house where the 1st appellant and Dee were said to have spent the night.

The learned trial judge, however, did reject the evidence relating to the cartridges and the firearm on the ground that it was weak on the basis of the inadequacies arising in PW7's forensic ballistics report and the witness's evidence in-chief. The respective Counsel appear to have accepted the learned judge's position and did not

argue the issue further. On a view of the evidence we think that the learned judge properly took that position. Besides the lack of clarity whether the cartridges talked about by PW3 and PW6 were one and the same or different, there was no knowing which one had no primer. More confounding, however, is PW7's evidence that the exhibits which he examined were given to him on 2nd January, 2015 a date which is well before the offences were committed on 9th February, 2015. We are satisfied in these circumstances that the evidence pertaining to the cartridges and the firearm was properly disregarded.

Besides the lapses observed in the preceding paragraph, this was the prosecution's evidence in relation to the 1st appellant.

In his defence, the 1st appellant denied having committed the two crimes. He admitted to having met Dee in Mwandi on 9th February, 2015 around 9:00 hours and also the next day on 10th February, 2015 around 14:00 hours. This second time Dee was in the company of PW5. He confirmed that after they met, Dee ran away and PW5 took him to the police station. The next day the police went with him to where the animals were recovered. He explained that he

arrived in Mwandi on the 8th February, 2015 following up Dee who owed him K500 for traditional treatment he had rendered to him. He denied that he led police to recover the firearm but that it was Castor Singogi's wife who took the firearm to the police.

Lindonga did give evidence in the court below in which he denied making the statement to PW4 or that he was involved in the crimes at Sesheke. Initially, he denied that he knew PW4 or that they were related as in-laws but later capitulated that he knew PW4 as the person who had once wanted to marry his wife and conceded that he saw no reason why PW4 would lie against him.

In his judgment, the learned trial judge, found that Lindonga's confession to PW4, which the learned judge believed to have been made on the basis that PW4's evidence was not challenged on the aspect, placed the 1st appellant at the scene of the crimes and the evidence of PW5 placed the 6 head of cattle in the 1st appellant's hands. The learned judge disregarded the 1st appellant's defence noting that PW4 and PW5 were credible witnesses with no reason to concoct a story about the 1st appellant. The learned judge accepted the fact that the 1st appellant and Dee left the deceased's cattle in

Singongi village. He applied the principles in the cases of **George Nswana v The People**[11] relating to inferences of guilt based on recent possession and **Maseka v The People**[12] relating to explanations made by an accused accounting for his possession of stolen property. The learned judge found that the 1st appellant had not offered any (reasonable) explanation as to how the cattle which were stolen only the previous day came into his possession. The judge concluded that the 1st appellant was the thief.

Applying **section 22** of the Penal Code relating to common intention and the case of **Winfred Sakala v The People**[13], the learned judge found that even though the evidence showed that Dee Liswaniso was the one who actually shot the deceased, the 1st appellant had the same intention, as we understood the learned judge, to kill Jonas Ndandumuna Muzala and steal his cattle. In the circumstances, it did not matter who pulled the trigger.

The learned judge found malice aforethought to have been established and that the case against the 1st appellant had been proved. He found no extenuating circumstances in the case.

The 1st appellant is equally dissatisfied with his conviction and has appealed on one ground that-.

> **The learned trial judge erred in law and fact when he convicted the 1st appellant based on inadmissible statements made by PW4 and PW5.**

The gist of Ms Banda's submission in support of this ground was that the statement made to PW4 by Lindonga that he was taken by the 1st appellant and Dee Liswaniso to the deceased's village where Dee shot the deceased dead as well as the statement made by Dee to PW5 that he and the 1st appellant had left six head of cattle at Singongi village were all inadmissible hearsay. It was contended that the approach taken by the trial court in accepting the statements (based on what the trial court regarded as the two witnesses' credibility) was a misdirection. The case of **Mutambo and 5 Others v The People**[14] was cited in relation to the holding in the English case of **Subramaniam v Public Prosecutor**[15] that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that**

the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

Ms Banda endeavoured to show, in any case, why there could have been no truth in what PW5 was purportedly told by Dee. It was pointed out that Lindonga denied making the statement (confession) to PW4 and that Dee was not called as a witness. Ultimately, that it was not explained how the cattle came to Mwandi Police Station and how the 1st appellant came to be connected to them.

With respect to the firearm, it was submitted that the trial court found that it was not sufficiently connected to the 1st appellant. In any case, that the evidence was that it was recovered in Singongi village at the house of Castor Singongi, whose relationship with PW5 was not established.

It was submitted that since the inadmissible evidence was erroneously admitted and relied on by the trial court, leading to the conviction of the 1st appellant he must be acquitted as there exists no other evidence to support the conviction.

In response to the foregoing, it was submitted by Mrs Kachaka on behalf of the State that the statements made to PW4 by Lindonga and PW5 by Dee were admitted to show that they were actually made and not to establish the truth of the statements as per authority in **Mutambo and Others v The People**[14]. It was argued that all the court did was to link the statements to other available pieces of evidence on record in order to come to its decision; that the statements by the two witnesses corroborated each other considering that the witnesses were unknown to each other but their evidence when read together pointed to the involvement of the 1st appellant. It was pointed out to the effect that the fact that Lindonga placed the 1st appellant and Dee at the scene of the crime and later PW5 found the 1st appellant and Dee and that they were in possession of 6 head of cattle was not a mere coincidence, that this was evidence of something more. It was submitted that the bare denials by Lindonga and the 1st appellant were meant to free them from being convicted. We were urged not to interfere with the conviction. This concluded the submissions by the parties.

We have also considered the appeal by the 1st appellant, the evidence in the Court below, the judgment of the Court and the submissions before us. The issue contended by Ms. Banda in the ground of appeal revolves around the reliance placed by the trial court on the implicatory statements made by Lindonga to PW4 and Dee Liswaniso to PW5. Learned Counsel's position is that the statements were hearsay and should not have been admitted into the evidence. Mrs. Kachaka's response was that the statements, while it is true that they were hearsay, were received as an exception to the hearsay rule which permits the admission of statements to show not the truth of what was being said but simply that the statements were made. Further that when taken with the other evidence given in this matter, it becomes clear that the 1st appellant was involved in the crimes committed in this case.

We agree that the statements attributed to Lindonga and Dee cannot be evidence against the 1st appellant because they were hearsay. In the case of **Maketo and 7 Others v The People**[16] it was held by this Court that-

> **"An extra-curial confession made by one accused person incriminating another co-accused is evidence against himself and not**

the other persons unless those other persons or any of them adopt the confession and make it their own."

In **Ivor Ndakala v The People**[17], it was similarly held by Cullinan J, in the High Court that-

"When an accused makes an extra-judicial statement in the absence of a co-accused, it cannot be regarded as evidence against the latter accused; but when the accused goes into the witness box at the trial and gives evidence which incriminates his co-accused, that evidence is admissible against the latter accused, and it may be regarded as evidence for the prosecution against him."

In the case before us, Lindonga in his defence completely denied telling PW4 that he together with the 1st appellant and Dee had gone to the deceased's village where Dee shot the deceased. It is clear that the 1st appellant did not adopt Lindonga's alleged implicatory statement so as to make it his own. Lindonga having denied the allegation in Court, the 1st appellant was not obliged to cross examine Lindonga on the veracity of the statement. At most and in line with the law explained in the two cases we have referred to, the extra curial statement was only evidence against Lindonga. The learned trial judge, therefore, misdirected himself in assessing the evidence before him on the basis of the credibility of the witnesses when the

issue before him was simply to determine whether the confession statement was admissible.

What we have said above applies with equal force to the implicatory statement allegedly made by Dee to PW5 more so that Dee was not even a witness in the Court below. In the result his statement cannot operate against the 1st appellant except to show his own involvement as an accomplice.

As for Mrs Kachaka's submission that the statements should be taken as an exception to the hearsay rule, our understanding of the principle in the **Subramaniam**[15] case is that the fact that the impugned statements were made must first be proved. The relevant portion of the case reads-

> **"The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."**

On a view of the evidence, it is clear that the statements were not proved to have been made. Lindonga flatly denied having made the allegation while Dee was not even called as a witness to confirm the allegation that he implicated the 1st appellant. For his part, the

1st appellant gave an account of how he found himself in Mwandi. In the circumstances, the statements having been disallowed, there is nothing to link the 1st appellant to the offences. We were, of course curious to know how the deceased's cattle ended up in Mwandi. Unfortunately, the evidence presented before the Court was not helpful. In the circumstances, there was no evidence that linked the 1st appellant to the two offences. The coincidences that the 1st appellant happened to be in Mwandi and had slept at Singongi village where the animals were found does not, without other supporting evidence, aid the prosecution's case. Besides as pointed out by Ms Banda, somewhere in her submissions, there was no clear evidence how the 1st appellant came to be connected to the 6 head of cattle. Chief Inspector Sipatela of Mwandi Police Post whom PW6 stated had informed him about the apprehension of the 1st appellant and the recovery of 6 heads of cattle was not called to confirm or state the circumstances under which the 1st appellant was apprehended. The result of this omission is again that PW6's claim about what he was told by Chief Inspector Sipatela is inadmissible hearsay and cannot be the basis for holding that the 6 head of cattle were found in the possession of the 1st appellant.

Our view of the appeal by the 1st appellant is that it has merit. We, accordingly uphold the appeal and set aside the conviction and the sentence. We acquit the 1st appellant and set him at liberty forthwith.

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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