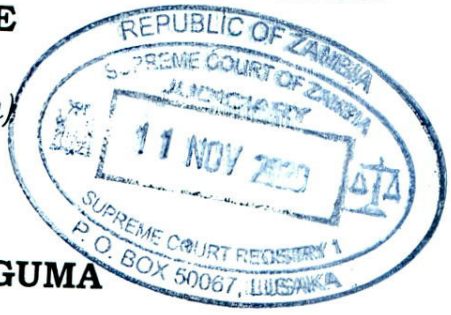
IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

SCZ APPEAL NO. 177/2020

(Criminal Jurisdiction)



BETWEEN:

BONIFACE CHIFUNGUMA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

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

For the Appellant: *Mr. K. Tembo, Legal Aid Counsel, Legal Aid Board*

For the Respondent: *Mr. C.K. Sakala, State Advocate, National Prosecutions Authority*

JUDGMENT

Chinyama, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Wilfred Sakala v The People (1987) ZR 33**
2. **S.V. Ganadi (29/84) (1984) ZA SCA, 31 August, 1984**
3. **Chimbo v The people (1982) ZR 20**
4. **R.V. Turnbull and Another [1976] 63 Cr App R 132**
5. **Mutale and Phiri v The People (1995-1997) ZR 277**
6. **Kalonga v The People (1976) ZR 124**
7. **Abraham Mwanza and 2 Others v The People, SCZ Judgment No. 37 of 1977**

The appellant in this case, Boniface Chifunguma was charged jointly with three others namely, Chipo Muchimba (A2), Moses Mulenga (A3) and Reuben Ndulinga (A1) for the alleged murder on 13th January, 2014 of 90 years old Person Kabamba in Luanshya's Kamirenda area on suspicion that he was a wizard that had fallen from a tree in the night. The appellant was tried and convicted in the Ndola High Court, Kabuka J, as she then was presiding. He was sentenced to death.

The background evidence given to the case was that the deceased used to live with his 55 years old daughter, Agness Kabamba Falanga (PW1) in the Kamirenda Area of Luanshya. Due to the advanced age, the deceased had become prone to memory lapses (senile) as he would go to other rooms when his intention was to go to the toilet. Sometimes he would go wandering outside.

On 12th January, 2014 the deceased wandered away from home and when he did not return and a search in the neighbourhood proved futile, PW1 reported the matter to police at the nearby TVTC College. At midnight she got a call from a police officer who directed her to where he was. She went there and found her father lying

naked on the ground with his clothes placed under his head. His pulse was faint, one hand was broken and he was barely breathing. He was covered in blood. He was taken to Thomson hospital where he died.

The evidence how the deceased came to be in the state in which he was found came from two witnesses PW2 and PW3. PW2 stated that, around 22:00 hours, she was on her way home within Kamirenda Township from work when she heard noise in the neighbourhood. She went to the source of the noise and found the appellant whom she knew as "*Jahman*" hitting an old man lying on the ground naked. He would raise the stick he held with both hands high above his head and bring it down with force. This was on a muddy path. The old man was not saying anything and blood was oozing from both ears. PW2 was able to see with the aid of light from her phone. PW2 pleaded with the appellant to let the old man go but he refused and rebuked her reminding her that it could have very well been herself whom the old man had come to bewitch. PW2 denied that the incident happened under a big tree but maintained that it was on a path although the tree was nearby.

Another witness, PW3 a neighbourhood watch member was at home on the fateful night when around 22:30 hours he heard some noise and he went to see what was happening. He found a crowd of people near a maize field. Using his phone light he saw the appellant whom he knew both by his nickname *"Rasta"* and given name, Boniface Chifunguma, hitting an old man lying on the muddy path. A tree was some 15 metres away. He also saw PW2 near the crowd as she pleaded for the appellant to let the old man be. He also saw Chipo Muchimba (A2) but he was standing away from the crowd. Following the incident the appellant and three other men were apprehended by police. According to PW5, the arresting officer, the deceased was suspected of being a wizard and that he might have fallen from the nearby tree.

At the close of the case for the prosecution the learned trial judge found A2, Chipo Muchimba and A4, Reuben Ndulinga with no case to answer and acquitted them. She, however, found the appellant and A3, Moses Mulenga with cases to answer and put them on their defence. According to the judgment both the appellant and A3 gave sworn evidence and A3 called a witness.

In his defence, the appellant testified that on the material night, he was on his way home from a funeral around 23:00hours when he heard shouting that a wizard had fallen from a tree. He went towards the noise and found an old man who was not talking. He then got a small stick with which he whipped the old man lightly but the old man was not responding. He left when the crowd got bigger and people were assaulting the old man. He stated that he was later apprehended by police on allegations of having assaulted the old man. He confirmed that PW2 did see him at the scene of crime. He, however, denied viciously hitting the old man or killing him.

For his part, A3 denied any involvement in the incident stating that he knocked off from work at around 23:00hours and went straight home. He only learnt from A2 after the incident as to what had transpired. DW3 confirmed in her evidence that on the night in question her husband A3, was with her at home at the material time.

The trial judge found that the evidence of PW2 and PW3 established that it was the appellant they saw hitting the old

man with the stick which must have been of considerable weight going by the effort exhibited by the appellant in lifting it high above his head before bringing it with forceful impact on the old man. The learned judge rejected the appellant's defence that he used a small stick to lightly whip the deceased bearing in mind the injuries sustained as shown in the post-mortem report. She found the injuries to be consistent with the manner PW2 and PW3 stated the old man was being struck with a stick.

The learned judge noted that the fact that the deceased could have been assaulted by others in the crowd of people did not exonerate the appellant as they were all culpable on the basis of the case of **Winfred Sakala v The People**[1] which considered **section 22** of the **Penal Code**) and held as follows-

> **"Section 22 of the Penal Code clearly contemplates that liability will attach to an adventurer for the criminal acts of his confederates, which will be considered to be his acts also, if what those confederates have done is a probable consequence of the prosecution of the unlawful common design."**

The learned judge found malice aforethought to have been established because by assaulting the deceased in the manner described by the witnesses, it was obvious that the appellant

intended to cause grievous harm or death to the deceased. She found that the guilt of the appellant had been established beyond reasonable doubt. Hence the conviction.

The learned judge considered whether there were extenuating circumstances and found none since the appellant was not "*induced to kill the victim owing to fear of what he believed the victim to have done or was likely to do to him or others whose lives and safety he felt concerned*" borrowing dictum from the South African Supreme Court of Appeal case of **S V Ganadi**[2]. The learned judge accordingly imposed the sentence of death.

In respect of A3, the trial judge found no evidence connecting him to the crime and she acquitted him.

The appeal is on two grounds, namely, that:

1. **The trial judge erred in law and fact when she believed the evidence of PW2 who had difficulty identifying the convict.**
2. **There being a lot of inferences that could have arisen as to the cause of the deceased's death, the trial judge erred in law and fact by not relying on the inference favourable to the convict.**

Mr. Tembo, on behalf of the appellant entirely relied on the heads of argument filed in support of the grounds of appeal. In his

submissions under this ground Mr. Tembo drew our attention to the learned trial judge's acknowledgement that PW2 took time to look at the appellant as if something was amiss before identifying him. It was submitted that the learned judge should have warned herself of the danger of a honest mistake in identifying the appellant citing the case of **Chimbo v The people**[3]. Further, that there was no clear identification of the appellant even on the part of PW3 who testified, according to Counsel, that it was the crowd that was referring to the young man being pulled away from assaulting the old man as "*Rasta*". The case of **R.V. Turnbull and Another**[4] was also cited for the admonition that a judge should examine closely the circumstances in which the identification by each witness is made taking care to note how long the observation took; at what distance; in what light; was the observation impeded in any way e.g by passing traffic or the press of people; had the witness ever seen the accused before; how often. Any weaknesses in the identification should be noted. In view of the foregoing, it was submitted that the judge erred in law and fact when she believed the evidence of PW2 who had difficulty in identifying the appellant and failed to warn herself of the

danger of convicting on the said evidence. We were urged to quash the conviction and acquit the appellant.

In the second ground of appeal, Mr. Tembo submitted that there were several inferences that could be made to account for how the deceased met his death. These were that he fell from the tree and sustained the (fatal) injuries; that he was severely beaten with different implements by the mob; and lastly that the appellant caused his death by whipping the deceased with a stick. It was pointed out that the deceased was found naked with clothes tucked under his head which implied that someone else could have beaten him and placed the clothes there. The case of **Mutale and Phiri v The People**[5] was cited for the holding that where two or more inferences are possible, the court must adopt one that is more favourable to the accused if there is nothing to exclude that inference. That where there are lingering doubts the court must resolve them in favour of the accused.

The case of **Kalonga v The People**[6] was also relied on for the adjunct that-

"an explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it. An accused is not required to satisfy the court as to his inconsistencies but simply to raise a reasonable doubt as to his guilt."

The submission extended to the trial judge's comment on the parity between the cause of death indicated in the post-mortem report and the assault by the appellant using a stick. It was contended that the other inferences suggested as to how the injuries came about could account for the cause of death. It was submitted in line with the case of **Abraham Mwanza and 2 Others v The People**[7] that the medical doctor who carried out the post-mortem should have been called to state the circumstances in which the injuries sustained by the deceased could have come about in order to confirm that they were as a result of the assault by the appellant, as we understood the submission. We were implored to reverse the conviction and set aside the sentence for the reasons given in the submissions.

Mr. Sakala on behalf of the State replied to the arguments on behalf of the appellant viva voce. With regard to the first ground of appeal, learned Counsel contended that at the hearing of the matter in the High Court, there was no issue of mistaken identity. PW2 had

known the appellant for 2 years. On the material date she found the appellant hitting the deceased. PW3 also knew the appellant as "*Rasta*" and found him hitting the deceased. Therefore, that the issue of (a mistaken) identity of the appellant did not arise. It was pointed out that the appellant had infact admitted being present at the scene and hitting the deceased and whereas he claimed to have whipped the deceased with a small whip the witnesses testified that he used enormous force.

In the second ground of appeal, Mr. Sakala responded that the conviction was not based on circumstantial evidence so that the issue of drawing other inferences does not arise. It was submitted that the learned trial judge was on firm ground in convicting the appellant and that we should uphold the conviction and sentence.

We are grateful for the brief but pointed submissions rendered by learned Counsel from either side. In relation to the first ground of appeal, it appears to us that the submission by Mr. Tembo is not well taken. This is because it is clear from the judgment of the Court below that PW2 took a bit of time to identify the appellant in the dock on account of the fact that at the time of the incident, the appellant's

hair was braided in dreadlocks while in court the hair had been cut. There was no issue that the person in the dock was the same appellant that the witness had seen on the day of the incident. In the circumstance the question of a mistaken identification and the need for the court to bear in mind the directions in the **Turnbull**[4] case did not arise. The witness had known the appellant for at least two years before the incident as the dreadlocked "*Jahman*". It is not surprising when she saw him in court without his trademark hairstyle she had to take a moment to confirm that he was the same person. As we have stated, there was no issue at the trial that the appellant in the dock was the same person seen at the scene of the crime. We see no merit in ground one of the appeal and dismiss it.

Turning to the second ground, we understood Mr. Tembo's argument to be that while there is no dispute that the appellant was at the scene of the crime and whipped the deceased it does not rule out the inference that the injuries that led to the deceased's death could have been by falling from the tree, being hit by others in the mob of people that were present or by the appellant whipping the deceased. The evidence of PW2 and PW3 which the court accepted

was that they saw the appellant raising the stick high in the air and brought it down to hit the deceased with considerable force. The learned trial judge latched on this and concluded that the nature of the injuries sustained by the deceased and the cause of death as disclosed in the medical report were consistent with the assaults by the appellant. It was not established in this case that the deceased had fallen from a tree and the probability that the deceased may have been equally assaulted by others in the mob does not reduce the appellant's culpability. In fact, the learned judge ably dealt with the matter in her judgment at page J17 where she stated:

> **"Any other person, unknown, who could have equally participated in the assault, premised on the same unfounded allegations of witchcraft, can only fall in the category of confederates of A1. Such persons could only have been pursuing the same unlawful purpose of assaulting the deceased which the accused was seen executing."**

Referring to the case of **Wilfred Sakala v The People**[1] which we have already noted the learned judge found that the prosecution had established a case of murder against the appellant. We entirely agree with the learned judge and see no reason to hold otherwise. The fact that other people may have joined in the collective enterprise of dealing with a suspected witch did not reduce the appellant's

culpability. We hold that there is equally no merit in the second ground of appeal and we dismiss it.

In sum the entire appeal has no merit and it is dismissed. Both the conviction and the sentence are upheld.

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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