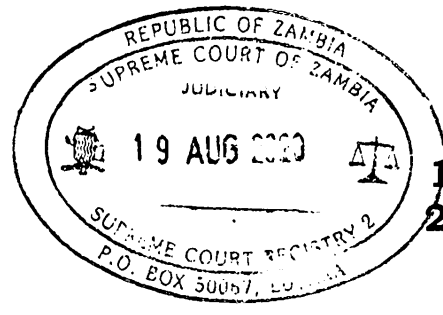
APPEAL NO.25, 26/2012

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Criminal Jurisdiction)



BETWEEN:

EMMANUEL NJAMBA — **1ST APPELLANT**
NAMAKANDO ZYAMBO — **2ND APPELLANT**

V

THE PEOPLE — **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 11th August, 2020 and 19th August, 2020

For the Appellants : Mr. K. Muzenga, Acting Director of Legal Aid

For the State : Mr C. Bako, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Chipango and Others v The People (1978) ZR 304**
2. **Choka v The People (1978) ZR 243**
3. **Haonga & Ors v The People (1976) ZR 200**
4. **Borniface Chanda Chola & Others v The People (1988-89) ZR 163**
5. **Yokoniya Mwale v The People, Appeal No. 185/2014**

The appellants appeal against their conviction for murder by the High Court.

The appellants were charged with the offence at a session of the High Court, presided over by Mchenga, J, as he then was, sitting at Mongu during the sessions of June, 2013. They were alleged to have murdered Sitali Wamunyima on 26th January, 2012 in Mongu.

The facts presented in the court below clearly established that the deceased was, in the evening of 26th January, attacked by assailants. It was also established that the deceased died from the wounds that he sustained from the attack. The two appellants were convicted of this offence on the sole testimony of a witness named Kalaluka Chilindo (PW1), who seemed to have been the only eye-witness to the attack. Hence, the appellants have directed the main thrust of their appeal to this witness. Their first ground of appeal, therefore, reads as follows:

> **"The learned trial court erred in law and in fact when after making a finding that PW1 was a witness with a possible interest to serve went ahead to accept his testimony in the absence of corroborative evidence or evidence of something more"**

So, in this appeal, our focus is also on the testimony of PW1. During the trial, PW1 told the court that, on the material day around 20:00 hours, he was walking home behind a man who was carrying a 10kg bag of mealie meal and a phone in his hand when, from the dark shadows, the two appellants and a friend of theirs named Ituta emerged and attacked the man ahead. PW1 then hid himself. When the appellants dragged the man to some dark place, PW1 managed to sneak out and ran home where he told his elder brother that he had found some of the young men from their compound attacking a person. He said that, the following morning, he heard that somebody had been found dead at the stadium. According to PW1, he went to the scene and found the body lying just at the place where he had seen the appellants attack that man. PW1 further said that the police came to the scene and picked the body, in his presence. Then, later, the police came back to the compound and picked him up, together with other people. He was taken to the police station where he was continuously interviewed, from morning until afternoon: He was even taken back to the scene where the police drew a sketch map. That is when he was released. According to PW1, he recognized the appellants because they were

notorious trouble makers within the area: and that the 1st appellant had previously attacked him.

However, PW1's version of the facts was contradicted by the other prosecution witnesses such as PW2 and PW3. Their story was this: That after he was attacked, the deceased managed to drag himself from the scene of the attack towards some neighbouring residences to seek help. This was around 20:00 hours. His weak calls for help attracted the attention of some young children who called older people. That is how PW2 and PW3 went to see the person who was calling for help. They both, immediately, recognized the deceased. They called for assistance and carried the deceased to his brother's house, which was nearer than the deceased's own house. The deceased's wife, PW4, was contacted. She arranged for transport to take the deceased to the hospital. That same evening, the deceased was taken to the hospital where he died the following morning, on 27th January, 2012.

It should be noted that, during cross-examination of PW1, the defence managed to demonstrate some inconsistencies in his testimony. Contrary to his assertion in examination in chief that the following morning he went to the scene of the attack and saw the body of the deceased, PW1, in cross-examination, conceded that he

did not find the body at the scene. But he then said that he found that the body of the deceased had just been picked up by the police a short while earlier. PW1 further said that during burial he viewed the body of the deceased lying in the coffin and then recognized him as the person that he had seen being attacked. However, when pressed further, he conceded that he did not link the deceased to the person whom he had seen being attacked, but that he merely heard from other persons attending the deceased's burial that the deceased was the same person who had been heard calling for help around the stadium area on the night that PW1 witnessed the attack.

The other witness was the arresting officer, PW5. He told the court that the assault on, and death of, the deceased was reported to the police in the morning of the 27th January, 2012 by his brother. PW5 then instituted investigations: He went to the scene of crime where he interviewed PW2, PW3 and PW4. According to his findings, the deceased had dragged himself for a little distance before he found help. PW5 was able to find the spot where the deceased was attacked by following the drag marks backwards. PW5 then told the court that, in the course of investigations, an informer within Kapulanga compound told him that the two

appellants and another person named Mukubesa Kuteta, popularly known as Katuta, were behind the killing of the deceased. On that information, he went and apprehended the two appellants, and placed them in custody. Again, later, he received information that PW1 had witnessed the attack on the deceased. He went and picked up PW1, and briefly detained him: According to PW5, PW1 confirmed having witnessed the attack. PW5 then charged the two appellants with the case of murder.

The trial judge warned himself that, because PW1 had been detained in connection with the murder, he could be said to be a witness with a possible interest of his own to serve. However, the judge accepted the arresting officer's explanation that PW1 was only detained because the police had information that he had witnessed the attack. The judge went on to note that it was not unusual in our country for the police to detain possible witnesses: a practice which he condemned strongly. The judge then found PW1 to be a witness of truth who was neither a suspect nor related to the deceased. He therefore saw no reason for PW1 to falsely implicate the appellants. With regard to PW1's failure to report the appellants to the police, immediately, the judge said that this was not surprising because the appellants were well-known thugs in the area. For the foregoing

reasons, the judge accepted PW1's testimony entirely. He found that PW1 had had ample time to recognize the appellants whom he knew, not only by their faces but by their voices as well. He convicted the two appellants of murder and sentenced them to death.

On behalf of the appellants, Mr Muzenga, on one hand, agreed with the lower court's treatment of PW1 as a witness with a possible interest of his own to serve. He submitted then that for this reason there was the danger that PW1 could have been falsely implicating the appellants; and that his testimony could not be relied on in the absence of corroboration, or evidence of something more. Counsel relied on our decision in **Chipango and Others v The People**[1] for that submission.

Mr Muzenga, on the other hand, disagreed with the trial court's view that PW1 was a witness of truth and that, because of that, the possibility of false implication had been ruled out. To support his position, he quoted our decision in **Choka v The People**[2], which says:

> **"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..."

Mr Muzenga went on to point out; first, the inconsistencies in PW'1s testimony; secondly, the previous bad relationship between him and the appellant; and thirdly, the detention of PW1 in police cells. He submitted that all these factors clearly showed that PW1's testimony was unreliable; and, therefore, his testimony could not be relied on merely for its plausibility, and the Judge's belief that he was telling the truth. With those submissions, Mr Muzenga urged us to allow the appeal on this ground alone.

Mr Bako, for the State, argued that PW1 was not even an accomplice, and that the only reason that PW1 was treated as a witness with an interest to serve was the unwarranted police detention. Mr Bako went on to argue that the trial court did not need to depend on corroboration only, but was merely required to satisfy itself that the danger of false implication had been excluded. In support of that submission, Mr Bako cited some cases, notably the case of **Borniface Chanda Chola & Others v The People**[4] and the case of **Yokoniya Mwale v The People**[5].

Mr Bako then argued that, in any case, PW1's testimony was supported by those of PW3 and PW5 who said that the deceased dragged himself from the same place that PW1 witnessed the attack.

We see merit in this ground of appeal and the arguments in support thereof. We do not think that the detention of PW1 was the factor upon which his testimony should have been approached with caution. In fact, we agree with the trial court that PW1's detention was unwarranted. The danger lay in a different area, altogether. As the trial court itself observed, the appellants were perceived as notorious thugs in their area. All the residents viewed them as such. The danger that the trial court should have guarded against is the prejudice against the appellants that inevitably resulted from their notoriety. This was evident from PW1's testimony when he said that the appellants were notorious trouble makers, prompting the appellants to object to the introduction of such evidence on the record (this is the subject of the second ground of appeal). So, PW1's testimony in this case was suspect because he fell in the category of people that were ordinarily prejudiced against the appellants on account of their infamy.

We have considered Mr Bako's argument that the place that PW1 mentioned as the scene of the attack matched the place mentioned by PW3 and PW5 as the one at which the deceased was attacked. The issue, however, is not about whether or not PW1 witnessed the attack on the deceased. We do not doubt that the attack which PW1witnessed was the same attack on the deceased. The issue is about the identity of the attackers. There are so many questions that can be asked about PW1's total conduct in this case: For example, why did he fail to report to the police, until they had to apprehend him? Then, why did he lie in court that the following morning, when he went to the scene, he found the body still lying there? When he was shown to have lied on this point, why did he further lie that he recognized the deceased lying in the coffin as the person that he had seen being attacked? All these questions portray PW1 as a very unreliable witness.

The learned judge explained PW1's failure to report the crime to the police as being the result of fear on PW1's part because of the notoriety of the appellants. This explanation was not given by PW1 in his testimony: In fact he gave no explanation, at all, on that point. This was, therefore, an assumption made by the Judge. It is an inference that could possibly be true. But another inference

could be true that PW1 may not have been very certain about the attackers that he saw and was, therefore, hesitant to commit himself; so that when he was picked up by the police, and the appellants were in custody, he simply went along with the accusation that it was the appellants who killed the deceased. His impressive testimony in court about his recognition of the attackers cannot carry much weight because the appellants are people that he knew very well; so that it would be easy for him to tell the court how he recognized them. Further, his subsequent lies in court should have given the trial court cause for concern because, by those lies, PW1 clearly manifested his inherent bias against the appellants, and his zeal to make his testimony watertight, in a possible bid to ensure that the appellants do not escape the consequences of this offence. The trial judge found PW1 to be a witness of truth, and that is what the judge considered to be 'something more' that satisfied him that the danger of false implication had been excluded. Yet PW1's lies showed that he was not a witness of truth; and so, truthfulness in this case could not be a ground to satisfy the court that the danger of false implication had been excluded. Now, then, what else was there to satisfy the court that it was not true that PW1 had been uncertain about the

identity of the attackers that he saw and hence he was reluctant to come forward with the information? We do not see any other evidence that was capable of providing that satisfaction. We, therefore, hold the view that there was nothing in this case that could satisfy the trial court that the danger of PW1 falsely implicating the appellants had been excluded.

Our holding, in the circumstances, is that this appeal should succeed just on this ground alone.

The second ground of appeal raises issue with the learned judge's refusal to expunge from the record PW1's statement that the appellants were well known trouble makers. According to the appellants, by his refusal, the learned judge allowed evidence of the appellants bad character on the record.

We think that the appellants have taken PW1's statement out of context. The witness made that statement when he was telling the court that he knew the appellants so well that he could not have mistaken other people for them. The statement was not made for the purpose of showing that, because of their notoriety, the appellants must have been the ones who committed the offence. In our view, therefore, no evidence of character was introduced in the evidence, although the perception by the public of the appellants as

notorious trouble makers, or thugs, did come out from the evidence; and this is the perception that we have said that the judge should have guarded against when dealing with the testimony of PW1. There is therefore, no merit in this ground.

The net result, however, is that this appeal is allowed. We quash the convictions and sentences against both appellants, we acquit them.

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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