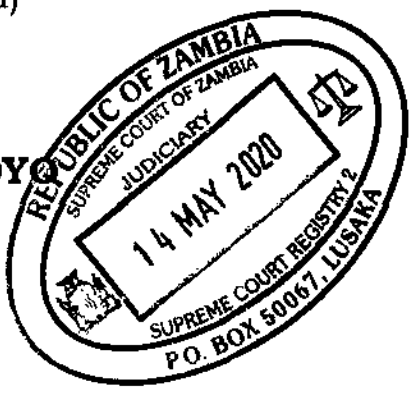
Appeal No. 18,19/2012

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:



FELIX CHIMEZA MOY **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram : **Phiri, Muyovwe and Lisimba, JJS**
On 4th December, 2012 and 14th May, 2020

For the Appellant: **Mr. I. Chongwe, Senior Legal Aid Counsel**

For the Respondent: **Mrs. M. M. Bah Acting Senior State Advocate.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Robson Banda vs Evaristo Mulenga (2003) ZR 121**
2. **Charles Nalumino v the People (1986) ZR 102**
3. **Chizonde vs The People (1975) ZR 66**
4. **Ali and Another vs The People (1973) ZR 232**
5. **Kabukala Abu Tambwe and Shafiko Hachi v The People (1987) ZR 15**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia**
2. **Criminal Procedure Code, Chapter 88 of the Laws of Zambia**
3. **Supreme Court Act, Chapter 25 of the Laws of Zambia**

When we sat to hear this appeal the Hon. Mr. Justice Lisimba was part of the court. He has since retired and this is a majority judgment.

This appeal is against the judgment of Madam Justice C. B. Phiri sitting at Chipata High Court on the 21st December, 2011 by which judgment she convicted the Appellant and one Abel Katakwe of two felonies of Aggravated Robbery and Murder contrary to **Section 294 and Section 200, respectively, of the Penal Code, Chapter 87 of the Laws of Zambia.** Abel Katakwe has since withdrawn his appeal.

In the first count, it was alleged that on the 10th of August, 2011 at Chipata, the Appellant and Abel Katakwe, jointly and whilst armed with iron bars, did steal from Anderson Ngoma three (3) cell phones valued at K4, 000 (rebased) the property of Nazir Badat, and used actual violence to the said Anderson ngoma in order to obtain or

retain the stolen property. In the second count it was alleged that the Appellant and Abel Katakwe on the same date and place, did murder the said Anderson Ngoma. Following their conviction, the duo were sentenced to 25 years imprisonment with hard labour on the first count, and the mandatory death sentence on the second count.

In the appeal before us, the Appellant canvassed three grounds; after abandoning the fourth ground at the hearing.

The grounds of appeal are as follows:-

1. **The learned trial Judge erred in law and in fact by not taking into account the Appellant's evidence.**
2. **The learned trial Judge misdirected herself in the manner she assessed the evidence of confessions by the Appellants.**
3. **The trial court erred in fact and in law when it convicted the Appellants when the evidence on record fell below the required standard of proof.**

In support of the first ground of appeal, Mr. Chongwe the learned counsel, submitted that the learned trial Judge only considered and assessed the evidence adduced by the Prosecution

witnesses PW1, PW3, PW4, PW5 and PW6 in order to make her findings of fact. In support of this argument Mr. Chongwe cited this court's decision in the case of **Rabson Banda vs Evaristo Mulenga**[1] where it was held that:

> **"This is a proper case in which to interfere with the findings of the trial court on the grounds that in assessing and evaluating the evidence, the trial Magistrate, and subsequently, the Appellate Judge, failed to take into account the Appellant's evidence."**

In support of ground two of the appeal, it was submitted that the purported confession given by the Appellant to PW5 was improperly admitted because the learned trial Judge failed in her duty to ask whether the Accused person (at the trial) wished to object to the admission of the confession statement as evidence. In support of this proposition, the case of **Charles Nalumino vs The People**[2] was cited. In that case, it was held that it was immaterial whether or not an accused is represented by Counsel, the court must in all cases ask whether the defence wish to object to the admission of evidence of a confession.

It was submitted, on behalf of the Appellant, that the omission by the trial court to ask the Appellant whether he objected to the

confession was a misdirection by the Prosecution which manifestly influenced the verdict.

In support of ground three (3) of the appeal, it was submitted that the Prosecution's evidence was tainted with many inconsistencies and irregularities which raised serious doubts about the guilt of the Appellant. It was stated that in one of the irregularities PW5 testified that no one charged the Appellant with the offence of Aggravated Robbery which fact made the conviction on that charge a mistrial and the proceedings a nullity. Secondly, PW4 claimed that the colour of the stolen cell phone was silver, when in his witness statement to the Police he said it was a black one. According to learned Counsel, this raised a question of credibility of PW4. Counsel also urged us to discount the evidence of PW6 with respect to the serial number of the Samsung cell phone recorded in PW6's diary which was not handed over to PW5 before commencement of trial; and that it was irregular for the Samsung cell phone and the diary to have been produced by PW6 instead of PW5 the arresting officer. According to the learned Counsel, the Samsung cell phone handset and the diary should not have been

produced as evidence because the requirement of identification were not met. In support of this argument, the case of **Chizonde vs The People**[3] and **Ali and Another vs The People**[4] were cited.

Finally, it was submitted that there was need for the holding of an identification parade in respect of the Appellant as court room identification by PW4 did not serve any purpose. Counsel urged us to allow the appeal.

In response to the arguments in support of ground one and ground three of the appeal, the learned Acting Senior State Advocate conceded that the learned trial Judge omitted to observe the requirements for the admission of the Appellant's confession statement; and, therefore, that the confession statement should have been disregarded. However, it was submitted that the evidence against the Appellant was so overwhelming that the charges were supported beyond reasonable doubt. It was argued that the Appellant led the Police to PW3 and PW4 and to the recovery of the stolen cell phone handset which was identified by the owner by its serial number; while his co-accused was apprehended by PW1 after a chase from the scene of crime at the victim's shop where the body

of the deceased lay. It was further submitted in response to the Appellant's arguments that the learned trial Judge did hear the Appellant's evidence but believed the evidence given by PW2; PW3 and PW4 and there was nothing to suggest that the Appellant was denied a fair trial.

We have considered the three grounds of appeal carefully. We have also considered the submission made by both sides as well as the evidence on the record of the appeal and the judgment of the lower court.

A careful study of evidence on the record of the appeal shows that the following facts were established.

The deceased was a watchman employed to guard Badat's shop, he was attacked by a group of robbers who also broke into the shop during the night. Three cell phones belonging to the shop owner were stolen. The deceased was bludgeoned to death during the robbery.

PW1 was a security guard employed by a bank located near the crime scene. He heard calls for help and joined other guards in the neighbouring shops. They came to the scene which was well lit and

pursued two of the robbers. PW1 joined the chase and apprehended one of the robbers who was identified as Accused 2. According to PW1, the second robber ran away from the scene and jumped a wall fence where he dropped a bag which PW1 picked. In the bag were two photographs of the Appellant. PW3 and PW4 were offered to buy the stolen Samsung phone by a person who was later identified as the appellant. PW4 bought it from the Appellant who later led the Police to its recovery from him (PW4). PW5 was led by the Appellant to PW4 to whom he sold the stolen cell phone handset which was identified by the victim of the robbery (PW6). Both PW3 and PW4 identified the Appellant as the person who sold the stolen phone hand set.

In his defence the Appellant claimed that he had been in Police custody for six days after he was detained for alleged theft of an amplifier. According to the Appellant, the Police came to show him his photographs and accused him of having taken part in the murder of the security guard which he totally denied. This was a summary of all the evidence received by the lower court in respect of the Appellant.

With regard to the first ground of the appeal, we do not agree that the learned trial Judge did not take into account the Appellant's evidence. This position is clearly shown in the following extract from the judgment at page 125 of the record:

> **"I find the evidence of the two (2) accused persons as mere fabrications which cannot be believed by any reasonable tribunal. For the foregoing I find that on the totality of the evidence as adduced by the Prosecution, they have proved this case beyond all reasonable doubts that the two(2) accused persons on the 10th August, 2011 broke into Badat's shop and stole three (3) cell phones and used iron bars to kill the guard."**

It is clear from the foregoing observation that the trial court looked at both sides of the case before discounting the Appellant's evidence. We find no merit in the first ground of appeal.

With regard to the second ground of the appeal, we agree with the submission that the learned trial Judge misdirected herself by failing to inquire into whether the defence wished to object to the evidence of the confession statement narrated by PW5 the arresting officer. The learned Senior State Advocate conceded this point, but submitted that the evidence against the Appellant was overwhelming. We agree with this view because the trial court did not only rely on evidence of confessions in order to settle on the convictions. The

court examined and assessed all the other evidence which implicated the Appellant and found it to be overwhelming as the evidence we have narrated in this judgment shows. The Appellant was seen dropping a bag which had two photographs of himself. In addition, the Appellant led the Police to more incriminating evidence from PW4 to whom he sold one of the stolen cell phones which was recovered and identified by its owner PW6. We are, therefore, in agreement with Mrs. Bah that notwithstanding the discounted confession, there was other overwhelming evidence against the Appellant from which the final result could not be altered. The case of **Charles Nalumino**[2] cannot be helpful to the Appellant because, in that case, the only incriminating evidence was the confession. Therefore, when the confession was discounted, there was no other evidence to implicate the accused.

Regarding the criticism that a Police identification parade should have been conducted, we do not see much value in this argument because the question of the Appellant's identity was never raised during the trial. The evidence on record established that the Appellant led the Police to PW3 and PW4 who he dealt with on the

next day of the robbery and murder as he touted the stolen cell phone for sale. In addition, the Appellant was seen in the two incriminating photographs which were found in the bag dropped by the robber who jumped the wall fence to escape the scene of crime after his colleague was apprehended by the security guards. Thus, the evidence of identification was conclusive.

With regard to the third and final ground of the appeal which questions the quality of the prosecution evidence and its efficacy, our considered view, as we have already observed in relation to ground one and two of the appeal, is that the evidence against the Appellant was overwhelming and conclusive. We have not seen any substantial or significant inconsistences or irregularities which could affect the outcome. The colour of the phone which was recovered from PW4 and its identity were tested in the evidence of PW4 and PW6 that was before the court. Any reference to a statement made to the Police was outside the evidence on record. Further, PW6's diary which had the phone's serial number was kept by PW6 himself and he was perfectly entitled to offer the diary as part of his evidence in court.

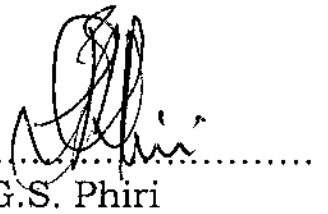
It is an elementary general rule of evidence that the guiding norms for admission of objects of evidence are authenticity, possession and relevance. None of these norms were violated in the present case.

Regarding the charge of Aggravated Robbery, the Appellant's submission is that this charge was a nullity because it was not initially preferred by the arresting officer. We must state that this argument is a misapprehension of the law and procedure as it applies to summary procedure trials by the High Court in our jurisdiction. As the record shows, the trial in the court below was commenced by way of Information by the Director of Public Prosecutions after a certificate of committal for trial by the High Court was issued by the DPP on the 19th day of October, 2011 in accordance with the provisions of **Section 137 of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia** which regulates the mode in which offences are to be charged. This law does not restrict or limit the trial only to the charges which an arresting officer may have preferred at the time of the arrest. The choice of offence or offences to be tried is strictly the preserve of the Director of Public

Prosecutions, or by default, through a preliminary inquiry by the Subordinate Court. In the present case, the charge of Aggravated Robbery was specified on the Information that was filed before the trial court in accordance with **Section 273 of the Criminal Procedure Code**. Therefore, there was nothing irregular. We do not find any merit in the third ground of appeal.

Before we end, we wish to mention that we have noted that the learned trial Judge did not indicate the exact section and subsection of **Section 294** under which the court settled the Appellant's convictions. In the case of **Kabukala Abu Tambwe and Shafiko Hachi v The People**[5] it was held that this court has power under **Section 15 (3) of the Supreme Court Act** to substitute a judgment of guilty of such offence as the trial court could have entered under the Criminal Procedure Code. In this case, because implements were used as weapons during the robbery resulting in the killing of the deceased the appropriate provision of the offended law is **Section 294 (2) (b)** which carries the death penalty. The net result is that we dismiss this appeal and set aside the 25-year sentence and in its place we order that the Appellant be sentenced to death for the

offence of Aggravated Robbery, Contrary to **Section 294 (2) (b) of the Penal Code, Chapter 88 of the Laws of Zambia**.



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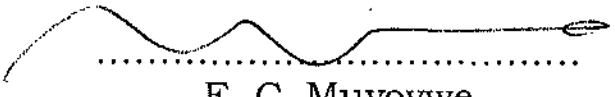
G.S. Phiri

SUPREME COURT JUDGE



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E. C. Muyovwe

SUPREME COURT JUDGE