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

Appeal No. 47/2019

**B E T W E E N:**

**FRAZER MULENGA** **APPELLANT**

**AND**

**THE PEOPLE** **RESPONDENT**



**Coram: Muyovwe, Hamaundu and Chinyama, JJS**
**on 14th July, 2019 and 19th August, 2020**

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

For the Respondent: Mrs. C. Mbewe-Hambayi, Deputy Chief State Advocate

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## J U D G M E N T

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**MUYOVWE, JS, delivered the Judgment of the Court**

**Cases referred to:**

1. **Sinyama vs. The People (1993-94) Z.R. 16**
2. **George Musupi vs. The People (1978) Z.R. 304**
3. **Simon Malambo Choka vs. The People (1978) Z.R. 243**
4. **Chimbini vs. The People (1973) Z.R. 191**
5. **Mutambo and Others vs. The People (1965) Z.R. 24**
6. **Ratten vs. R (1972) A.C. 378**
7. **David Zulu vs. The People (1977) Z.R. 151**
8. **Dorothy Mutale and Another vs. The People(1995-1997) Z.R. 227**
9. **Mwewa Murono vs. The People (2004) Z.R. 207**
10. **Joseph Mulenga vs. The People SCZ Appeal No. 128/2017**

**11. Yokoniya Mwale vs. The People SCZ Appeal No. 285/2014**
**12. Director of Public Prosecutions vs. Risbey (1977) Z.R. 28**
**13. Kenmuir vs. Hattingh (1974) Z.R. 162**
**14. Kambarage Kaunda vs. The People (1990-1992) Z.R. 215**

The appellant was tried and convicted of the offence of murder by Chisanga J (as she then was) sitting at the High Court in Kasama. It was alleged that on 16th October, 2008 at Kasama he murdered Morgan Musonda.

The facts established by the court below are that on the 13th October, 2008 between 21:00 hours and 22:00 hours in the company of George Mwansa, PW1 went to look for the deceased. They found him inside Musasa Bar. There was enough lighting inside the bar although it was faint. The deceased informed them that he intended to sleep at the bar as he had differed with his wife. PW1 convinced him to return home but he decided to buy cigarettes before they started off. Whilst waiting for the deceased, PW1 sat on one of the two bicycles in the bar as she could not find a seat. The owner of the bicycle who turned out to be the appellant chased her from the bicycle. She got off but the appellant started insulting her. This displeased the deceased who censured the appellant to stop insulting PW1. The deceased then went outside

the bar followed by the appellant. PW1 also went outside to wait for the deceased and George Mwansa.

As PW1 waited outside the bar, George Mwansa called her and informed her that the deceased had been stabbed and she rushed to the scene where she found the deceased lying on the ground in a pool of blood. She asked the deceased what had happened, and he told her that it was the owner of the bicycle she had sat on who had stabbed him with a knife. The deceased was rushed to the hospital.

The following morning PW1 went back to the bar. She found that the bicycles were still parked in the bar. The owners of the bicycles arrived at the bar to collect their bicycles. PW1 identified the appellant as the owner of the bicycle which she had sat on the previous night and as the person who had insulted her and had an exchange of words with the deceased. With the help of a passerby, PW1 managed to take the appellant to the police station where he was detained and charged with unlawful wounding and upon the death of the deceased, he was charged for the offence of murder.

Ms. Banda, learned Counsel for the appellant has advanced three grounds of appeal couched in the following terms:

1. **The learned trial judge erred in law and in fact when she relied on the uncorroborated evidence of PW1 who was a witness with a possible interest to serve.**
2. **The learned trial judge misdirected herself when she considered the alleged statement of the deceased as part of res gestae.**
3. **The learned trial judge erred in law and in fact when she convicted the appellants based on circumstantial evidence when clearly an inference of guilt was not the only inference that could be drawn from the evidence on record.**

Ms. Banda entirely relied on her written heads of argument filed herein. She argued ground one and two together. It was pointed out that out of the three witnesses for the prosecution only PW1 implicated the appellant. Relying on the case of **George Musupi vs. The People**[2] and **Simon Malambo Choka vs. The People**,[3] Ms. Banda argued that since PW1 had a relationship with the deceased, the learned trial judge should have warned herself against relying on PW1's evidence as she was a witness with an interest to serve, especially that she had a strong desire to find the person who was responsible for the deceased's death.

It was submitted that PW1 was a single identifying witness whose evidence should have been treated with particular care. In support of his argument, Ms. Banda relied on the case of **Chimbini vs. The People.**[4] She pointed out that George Mwansa was a witness to the happening of that night but the prosecution failed to call him as a witness. Ms. Banda submitted that the deceased was drunk at the time of the incident and may not have seen his attacker and that, therefore, PW1's statement that it was the appellant who attacked him should have been considered as hearsay. That had the learned trial judge considered the inadmissibility of the hearsay evidence 'found in the alleged statement of the deceased' including the fact that PW1 was a witness with an interest to serve, she would not have relied on it to convict the appellant. To buttress her argument Ms. Banda relied on the case of **Mutambo and Others vs. The People.**[5] She relied further on the case of **Ratten vs. R.**[6] where the Privy Council stated:

> **"where a hearsay statement is made either by the victim of an attack by a by-stander, indicating directly or indirectly the identity of the attacker, the admissibility of the statement is said to be dependent on whether it was made as part of the re gestae (all facts**

**so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it one continuous transaction). The first was that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second was the risk of concoction of false evidence by persons who have been victims of assault or accident."**

Ms. Banda's argument is that because PW1 had a confrontation with the appellant, she had him in mind and concluded that he was the one who stabbed the deceased. It was strongly argued that George Mwansa who is alleged to have witnessed the stabbing should have been called to testify and in the absence of his evidence, PW1's evidence should be discounted for lack of corroboration. Counsel referred us to the case of **Edward Sinyama vs. The People**.[1]

Ground three was argued as an alternative ground. The case of **David Zulu vs. The People**[7] on circumstantial evidence was cited as well as the case of **Dorothy Mutale and Another vs. The People**[8] where we have guided trial courts to guard against drawing wrong inferences. The case of **Mwewa Murono vs. The People**[9] was cited adding that any lingering doubts should have been resolved in favour of the appellant.

Ms. Banda argued that bearing in mind that the evidence against the appellant was insufficient, the decision of the lower court should be quashed and return a verdict of not guilty and set the appellant at liberty.

Mrs. Mbewe-Hambayi the learned Deputy Chief State Advocate relied on her filed response to the appellant's heads of argument. In response to ground one, it was submitted that PW1 was not a witness with an interest to serve. She pointed out that the evidence before the trial court indicated that PW1 did not know the appellant and, therefore, had no reason to falsely implicate him. Mrs. Mbewe-Hambayi disputed that the relationship PW1 had with the deceased affected the veracity of her testimony. She submitted that in the absence of concrete evidence of the nature of the relationship between PW1 and the deceased, there is no ground to state that this would impact on the value of PW1's testimony. Mrs. Mbewe-Hambayi relied on the case of **Joseph Mulenga vs. The People**[10] in which we referred to the case of **Yokoniya Mwale vs. The People**[11] where we pronounced ourselves on how trial courts should treat evidence of relatives or friends. It was submitted that PW1's evidence did not require corroboration simply because she appeared

to know the deceased person. Counsel submitted that the trial court found PW1's evidence credible and that on the authority of the case of **Director of Public Prosecutions vs. Risbey**[12] and **Kenmuir vs. Hattingh**[13] we cannot substitute our own findings as we have not had the advantage of seeing and hearing the witnesses.

Mrs. Mbewe-Hambayi submitted that even if we were to perceive PW1 as a suspect witness the appellant in his evidence provided corroboration to PW1's evidence: he confirmed that he was at the bar at the material time; he parked his bicycle inside the bar thereby confirming her evidence that she had sat on his bicycle which angered him and he hurled insults at her; he left his bicycle at the bar and returned for it the following day thereby confirming her story that the next day, she saw him at the time he was getting his bicycle from the bar. Mrs. Mbewe-Hambayi took the view that the fact that he went to collect his bicycle the following day confirms that he fled the scene after stabbing the deceased. Counsel argued that the failure by the trial court to warn itself against relying on uncorroborated evidence should not be an issue because PW1 was not a suspect witness and in any case, there is ample corroborative evidence on record.

In response to ground two, it was submitted that the learned trial judge was on firm ground when she relied on **Sinyama vs. The People**[1] having regard to the circumstances under which the statement was made. That PW1 was not a suspect witness and had no motive to fabricate the events of that day. We were urged to uphold the finding by the learned trial judge that the statement by the deceased qualified to be considered as *res gestae*.

Coming to ground three, Mrs. Mbewe-Hambayi argued, *inter alia*, that there was cogent evidence which clearly connected the appellant to the commission of the offence especially that he was the only person who quarreled with the deceased at the bar that night.

We have considered the submissions from learned Counsel.

We wish to immediately address ground three of the appeal. It is contended that the learned trial judge convicted the appellant on circumstantial evidence. As we have noted herein, Ms. Banda relied, amongst other cases, the cases of **David Zulu vs. The People** and **Dorothy Mutale and Another vs. The People**. We did point out to Ms. Banda during the hearing of the appeal that our

perusal of the judgment of the lower court revealed that the conviction was not based on circumstantial evidence. In fact, it was based on the evidence of PW1 and the statement made by the deceased to PW1 which the judge accepted as *res gestae.* It appears to us that Ms. Banda decided to cast her net wide hence the inclusion of this ground which cannot be sustained. Ground three is dismissed.

Turning to ground one, the gist of Ms. Banda's argument is that PW1 was a witness with an interest to serve and that her evidence required corroboration. Within this ground, Ms. Banda attacked the prosecution for failing to call George Mwansa in view of the fact that from PW1's evidence, it appears that he witnessed the stabbing and would have given direct evidence as to what transpired. While we agree that it was desirable for the prosecution to call George Mwansa, we do not believe that the absence of his evidence affected the reliability of PW1's evidence.

Focusing on the main issue of the status of PW1 as a witness, we agree with Counsel for the State that the relationship between PW1 and the deceased was not established. However, from the facts of this case, we are unable to conclude that PW1 was a

suspect witness whose evidence would require corroboration. The evidence on record reveals that PW1 in the company of one George Mwansa took the trouble to follow the deceased to the bar in their quest to bring him home that night. Unfortunately, he got stabbed and the following day, PW1 pursued his attacker to bring him to book. We take the view that: simply because PW1 was insulted by the appellant as he demanded for her to get off his bicycle; she rushed to where the deceased was stabbed, rendered assistance to take him to the hospital and the following day, she went to search for the person who stabbed him cannot make her a suspect witness. We agree that PW1's conduct reveals that she had some form of relationship with the deceased, but this cannot make her a suspect witness. We have stated in a plethora of cases such as **Yokoniya Mwale vs. The People**[11] that evidence of relatives or friends of the deceased or victim will not necessarily require corroboration as situations may arise where they are the only witnesses to a crime. In this case, it is clear from the narration of the events of the night in question that the appellant was a total stranger to PW1 and indeed to the deceased. We find no reason why PW1 would falsely allege that she encountered him in the bar

on that night and that she helped in his apprehension. She placed him at the scene of crime and as Mrs. Mbewe-Hambayi argued, the appellant also placed himself at the scene as he admitted that he patronized the same bar on the fateful night. It is incredible that the appellant's testimony was that he saw PW1 for the first time in court yet she is the one who, in broad daylight, with the help of a stranger, took him to the police where he was detained for the subject offence. We find no merit in ground one of the appeal.

In ground two, Ms. Banda attacked the learned trial judge's finding that the statement made by the deceased to PW1 qualified as *res gestae.* Counsel opined that going by the facts, this case did not meet the threshold set by the case of **Sinyama vs. The People**[1] where we held that:

> **A statement is not ineligible as part of the res gestae if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case.**

It is necessary at this stage to look at PW1's evidence to establish whether this case meets the threshold set by the case of **Sinyama.** It should be noted that **Ratten vs. R.**[6] (relied on by Ms. Banda) was cited with approval in the **Sinyama case**. The following is part of PW1's evidence as to her conversation with the deceased whom she found lying on the ground after he got stabbed:

> **".....when I reached there I found that he was bleeding he had lost a lot of blood. I asked Morgan what happened he answered that I have been stabbed with a knife. I asked who has stabbed you he said it the owner of the bicycle where I sat he followed me here outside because of what I had told him that the person you are insulting has left your bicycle quietly.....He said that he tried to avoid him by running away but he got tired, then he said don't ask me many questions just look for transport so that you can take me to the hospital. I booked a taxi"**

The description given by PW1 as to the condition that she found the deceased clearly shows that he was in the throes of the event and could not have any opportunity to concoct the story. The statement by the deceased was not a hearsay statement because it was made as part of the *res gestae.* PW1 explained what she was told by the deceased as he lay in a pool of blood. Ms. Banda alluded to the fact that the deceased was drunk at the time of the

stabbing and that therefore he could have mentioned the wrong person as having attacked him. Our perusal of the record reveals no evidence whatsoever that the deceased was drunk at the time when PW1 found him or indeed at the time she found him in a pool of blood after the stabbing. We have no hesitation in agreeing with the learned trial judge that the statement by the deceased to PW1 was part of the *res gestae.* Ground two fails.

Having considered the evidence on record, we find that the learned trial judge cannot be faulted as the prosecution proved its case against the appellant beyond reasonable doubt. In the premises, the appeal is dismissed for lack of merit.

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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**