**IN THE SUPREME COURT FOR ZAMBIA**
**HOLDEN AT KABWE**

**SCZ APPEAL NO. 193/2020**

*(Criminal Jurisdiction)*

**BETWEEN:**

**PAULOS SIMFUKWE** — **APPELLANT**



**AND**

**THE PEOPLE** — **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 1st December, 2020 and 8th December, 2020

*For the Appellant:* *Mrs. M. Marebesa, Legal Aid Counsel, Legal Aid Board*

*For the Respondent:* *Mr. F. M. Sikazwe, Acting Principal State Advocate, National Prosecutions Authority*

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## J U D G M E N T

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

**Cases referred to:**

1. **Dorothy Mutale and Richard Phiri v The People (1997) SJ 51**
2. **Francis Mayaba v The People, SCZ Judgment No. 5 of 1999**
3. **Saidi Phiri v The People, SJ No. 30 of 2015**
4. **Saviour Mukanso v The People, Appeal No. 80 of 2017**
5. **Mwaba E and 4 Others v The People (1987) ZR 19**
6. **Tembo v The People (1972) ZR 220**

The appellant, Paulos Simfukwe, who was the 1st accused (A1) in the High Court at Kasama, was jointly charged with seven other accused persons namely, Yardson Ngambi (A2), Lloyd Mutambo (A3), Patrick Muwowo (A4), Gilbert Sichone (A5), Derrick Sichone (A6), Friday Sikaona (A7) and Yuyu Sichone (A8) for the murder of Kenneth Simfukwe Chambula on 27th January, 2009 at Nakonde in the then Northern (now Muchinga) Province of Zambia. The appellant was convicted of the offence and sentenced to death, the learned presiding judge Kabuka J, as she then was, having found no extenuating circumstances. The appellant's seven co-accused were found not guilty of the offence and acquitted. The appeal is against conviction.

The appellant was convicted on the circumstantial evidence given by village headman Patrick Kaombwe Sichone (PW3) of Kaombwe village in Nakonde district and the appellant's own evidence. PW3's evidence established that in the night of the fateful day, the appellant in the company of PW2 and two men, named Mulotwa Silwimba and Kalola Siwale had visited him at his house and informed him that they had apprehended a cattle thief. He knew all four men very well. They had with them a cow allegedly recovered

from the thief but did not have the thief with them. When he asked them where the thief was, they told him that they had left him at a place called Lali section within the headman's village. He told them to go and bring the thief. They went away and never returned. The next morning, PW3 was informed that the deceased had been found dead at Lali section. He went there and saw the body of the deceased. The matter was reported to police who went and collected the body. A post mortem examination of the deceased's body revealed the cause of death as being "*suffocation using a rope around the neck*". The injuries found on the body, according to the post mortem examination report, were "*two deep cuts on the head; blood on the scalp, one upper tooth broken; and a hyperpigmentation ring around the neck.*"

The evidence by the appellant on which the trial court relied established that on the 27th January, 2009 the appellant together with Mulotwa Silwimba and Kalola Siwale were looking for the appellant's cow that had been stolen. When they reached Mutachi village where PW2 resided, they saw a person who turned out to be the deceased tethering a cow to a tree. The appellant recognised the

animal as his stolen cow. They apprehended the deceased with the help of members of the public. The deceased confessed that he was involved in stealing animals with two others and led his captors to PW2. A black bull was recovered from PW2's kraal. The deceased, PW2 and the two animals were picked up with a view to taking them to Nakonde police. They ended up at PW3's place but without the deceased who, according to the appellant, escaped on the way.

The learned judge found that the appellant, by his evidence, had placed himself at the scene and at the centre of the events leading up to the death of the deceased. She noted that the appellant was with the deceased at all material times until his death. She found that the deceased died whilst he was a captive of the appellant and that the appellant was an active participant in the death of the deceased. The learned judge appeared to be satisfied with this conclusion based on the evidence of PW3 whom she regarded as reliable and truthful. This evidence was that the appellant and his colleagues had told PW3 that they had left the deceased at Lali Section and yet the deceased was found dead at Lali the following morning which, according to the learned judge, confirmed that he was already dead when the

appellant and his party left him there. She rejected the appellant's explanation that the deceased escaped on the way to PW3's house.

The learned judge considered the post mortem examination finding that death was due to suffocation arising from a rope that was tied around the deceased's neck. The judge was of the view that suffocating the deceased with a rope showed that death was intended and, therefore, that malice aforethought had been established as defined in **section 204(1)(a)** of the **Penal Code**. She found the case against the appellant proved beyond doubt and she convicted him of murder.

There was evidence from two prosecution witnesses, Sadwell Sing'ambi (PW1) and Maybin Sing'ambi (PW2) who were father and son which the learned trial judge rejected and did not consider. Both witnesses confirmed that the appellant in the company of his co-accused, in the court below, and other persons, did go to PW2's home on 27th January, 2009. According to PW1, the deceased was his nephew. He saw the appellant, his co-accused and other people in his village at around 14:00 hours. They were looking for a cow that the deceased, who was alive at the time, was alleged to have sold to

PW2. A search was conducted in the kraal and they did not find it. One bull was picked out and tied with a rope on one leg. They also got PW2 whom they said they were taking to the police as well because he was a thief, like the deceased. The group threatened to beat up PW2 in the same way that they had beaten the deceased whom the witness first said was unconscious, unable to speak and had injuries such as a cut on the forehead and wounds on the head. PW1 instructed four grandchildren to accompany the group for the safety of PW2. They went away.

Turning to PW2, his evidence was that the group comprising the appellant and his co-accused and other people, arrived at his home around 12:00 hours and had the deceased with them. The deceased was tied with a nylon rope around his neck. The rope was in turn tied to the leg of a cow which was pulling him as they walked. He saw all accused beating the deceased and in particular that the appellant beat the deceased with a stick in the ribs. Also, that A3 hacked the deceased six times in the head with an axe. PW2 confirmed further, that the appellant and his party took him and the deceased with them. The intended destination was Nakonde Police Station but that

only him, the appellant, Mulotwa Simfukwe and Kalola Siwale ended up at PW3's home. The deceased died on the way at Lali section where the appellant's co-accused fled. He stated that PW3 told them to go away since they had already killed the person. The next morning, he went back to Lali section and found the body of the deceased where they had left the deceased. He saw injuries on the body and that the rope had been removed. PW2 admitted in court that he had told police that the deceased had been shot but conceded that this was not true.

The learned trial judge regarded PW1 to be a suspect witness whose evidence needed to be corroborated on the ground that he was related to the deceased and was the father of PW2 who was accused of being the deceased's accomplice in the theft of cattle. Therefore, that the danger of false implication was present fuelled by his relationship with the deceased and the need to restore his family's integrity shattered by the allegations against his son. The learned judge looked for corroborative evidence but did not find it.

As regards PW2 the learned judge recalled that the witness had lied to the police that the deceased had been shot but recanted it in

court. The learned judge took the position that PW2 also lied that the deceased was hacked six times by A3 with an axe in view of the post-mortem examination finding was that the deceased had only sustained two deep cuts in the head. Based on the foregoing, the learned judge rejected the evidence of PW2 as being that of a pathological liar and was unreliable.

The appeal is on one ground that-

> **"The lower court erred in law and fact when it convicted the appellant based on the fact that he was part of the joint adventure to assault the deceased when there is in fact no evidence on record to prove that the appellant was part of the joint adventure to assault the deceased."**

Mrs Marebesa submitted in her written heads of argument that the only evidence that tended to implicate the appellant in the assault of the deceased came from PW2 whose evidence was rejected by the trial court. This means that there was no evidence connecting the appellant to the offence. Learned Counsel argued that the fact that the appellant apprehended the deceased does not establish that he assaulted the deceased, as we understood her. Therefore, that it was erroneous for the court below to conclude that the fact that the appellant was with the deceased meant that he was part of the joint

venture to assault the deceased when the appellant had told the court that his aim was to take the appellant to police after apprehending him. According to counsel, the evidence on record points to the fact that the deceased was assaulted by members of the public. Counsel submitted that there were two inferences capable of being drawn as to how the deceased met his death: either that he was assaulted and strangled to death at Lali section where the appellant and others left him or that he was left at Lali after he was assaulted and strangled. It was, accordingly submitted that in line with the case of **Dorothy Mutale and Richard Phiri v The People**[1], we should adopt the inference more favourable to the appellant that the deceased was assaulted and strangled after the appellant and the others had left him at Lali section. We were implored to acquit the appellant. In the alternative, Mrs Marebesa submitted at the hearing of the appeal that should we find that the appellant was part of the group that assaulted the deceased, then we should return a verdict of manslaughter in the place of murder on the authority of the case of **Francis Mayaba v The People**[2].

In response, Mr. Sikazwe in his written heads of argument submitted that there was overwhelming evidence on record that proved beyond reasonable doubt that the appellant was part of the joint venture to assault the deceased and caused his death with malice aforethought. Learned counsel argued that besides the evidence of PW2 that was rejected by the trial court for being unreliable, there was other circumstantial evidence from which an inference of the appellant's guilt could be and was in fact drawn. This being comprised in the evidence of PW3 and the appellant's own evidence. It was submitted, in line with our decisions in **Saidi Phiri v The People**[3] and **Saviour Mukanso v The People**[4] that sufficient facts had been established which taken together implicated the appellant in such a manner as to point to nothing else but the appellant's guilt. It was reiterated that the fact that the deceased's body was found at Lali section where the appellant and his group told PW3 that they had left the thief confirmed that the deceased was already dead when he was left there and that the deceased met his fate while he was still a captive of the appellant who was a participant in committing the murder.

Mr. Sikazwe reacted to Mrs. Marebesa's alternative argument that we should consider returning a verdict of manslaughter if we find that the appellant was part of the group of people that assaulted the deceased in line with our decision in the case of **Francis Mayaba v The People[2].** Learned counsel submitted that the participation of members of the public in assaulting the deceased does not absolve the appellant from guilt. He, like all the others, was a joint adventurer whose actions resulted in the death of the deceased. Reference was made to sections 21 and 22 of the Penal Code as well as the decision of this court in the case of **Mwaba E and 4 Others v The People[5].** It was submitted that the circumstantial evidence in this case had taken it out of the realm of conjecture and sufficiently connected the appellant to the commission of the crime. We were urged to uphold the conviction and dismiss the appeal.

We have considered the sole ground of appeal and the one issue raised around it. This is whether, after the trial court had rejected the evidence of PW2 that alleged the direct participation in the assault on the deceased by the appellant, there was other evidence connecting the appellant to the commission of the offence.

We agree with the learned advocates that the only evidence left to the court below to assess the guilt or otherwise of the appellant was circumstantial once the evidence of PW2 (and even that of PW1) was removed. The question is whether the circumstantial evidence was cogent enough to lead to only one conclusion that the appellant had committed the crime at issue, especially in the light of the clearly conflicting evidence given by the two sides.

According to PW3, whom the learned trial judge believed, Mulotwa Silwimba told him that they (referring to the four of them) had left the thief at Lali section of the headman's village. That when PW3 told them to go and fetch him, they went away and did not return. That the following day the deceased was found dead at Lali section.

The appellant's evidence was, however, that the deceased escaped from his captors while on the way to see PW3 *en route* to the police suggesting that he could not have known what happened to the deceased after he had escaped. It also appears to be the appellant's case that the injuries sustained by the deceased may have been inflicted by members of the public who apprehended him when

the appellant and his party found him with the appellant's cow in the village.

The learned trial judge preferred the evidence of PW3 based on her faith in the testimony of the witness whose demeanour impressed her. From this evidence and the evidence from the defence that the deceased had been in the appellant's custody, she found that the appellant placed himself at the centre of the events that led to the deceased's death. She also concluded that the appellant was an active participant in the death of the deceased who died by being suffocated with a rope around his neck. The learned judge rejected the appellant's evidence that the deceased escaped from his captors before they reached PW3.

We have no reason to disagree with the trial judge who was able to assess the demeanour of both PW3 and the appellant and chose to believe PW3. PW3 was not cross-examined on the issue creating the impression that the appellant's explanation that they told PW3 that the deceased had escaped was an afterthought. We, therefore, accept that Mulotwa Silwimba told PW3 that they had left the thief, who turned out to be the deceased, at Lali. The question then is, why

was Mulotwa Silwimba and the others in the group who included the appellant not forthright in telling PW3 the reason for leaving the deceased behind. The only reasonable explanation would be that they already knew what had happened to the deceased and feared to implicate themselves in his death. We are inclined to agree with the learned trial judge that the deceased did not run away as portrayed by the appellant but that he was already dead or left for dead when the appellant and his party went to see PW3. Had it not been so they would have returned with him to the headman. The foregoing, in our view, was cogent circumstantial evidence supporting the only inference that the appellant was an active participant in causing the death of the deceased by suffocation which occurred at the time when the deceased was a captive of the appellant and his colleagues. He was, therefore, culpable as a principal offender within the terms of sections 21 and 22 of the Penal Code as well as the decision in the case of **Mwaba E and 4 Others v The People**[5] in which it was held that-

> **"(i) Where joint adventurers attack the same person then, unless one of them suddenly does something which is out of line with the common scheme and to which alone the resulting death is attributable, they will be liable.**

**(ii) Where the evidence shows that each person actively participated in an assault then they were all *crimines participes*. The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative affect overcame the deceased."**

On the evidence before the trial court, the appellant was clearly the prime mover and a joint adventurer in an enterprise that culminated in the unfortunate death of the deceased. He never disassociated himself from what was going on. Therefore, Mrs Marebesa's argument that the appellant could not have been part of the joint enterprise to assault the deceased who, according to learned counsel, was assaulted by members of the public and that his mission was only to take the deceased to the police cannot be sustained.

We also think that the trial court should not have rejected the whole of PW2's evidence on the ground that he had been shown to have lied on some aspects of the case. In the case of **Tembo v The People**[6], it was held by the Court of Appeal, forerunner to this court that-

**"When a witness, and particularly an accused person, is proved to have lied in material respects, unless the untruthful portions of his evidence go to the root of the whole story to the extent that the remainder cannot stand alone, such remainder is entitled to due**

**consideration. The weight of the remainder is affected by the fact that the witness has been shown to be capable of untruthfulness, but the remainder must still be considered to see whether it might reasonably be true; it cannot be rejected out of hand."**

The statement made by PW2 to police that the deceased had been shot which he recanted in court as being untrue was not in dispute in this case. The Court below only used it as a basis for assessing the witness's credibility which the Court was entitled to do but was in any case a statement outside court. More importantly, it clearly did not go to the root of the case which alleged the killing of the deceased by suffocation. As to PW2's evidence that A3 hacked the deceased six times with an axe which contradicted the post mortem examination evidence that found that the deceased had sustained only two deep wounds, this contradiction did not also go to the root of the case which is that the appellant died from suffocation which had nothing to do with the injuries arising from the alleged hacking.

There were clearly pieces of evidence from PW2 that fitted well with other evidence unaffected by the lies which the witness was found to have told. For instance, PW2 gave evidence that when the appellant and his co-accused arrived at his home he noticed that the deceased had a rope tied around his neck with the other end tied to

the leg of the animal the deceased was accused of having stolen. The evidence that a rope was tied around the deceased's neck resonated well with the observations made by the prosecution witnesses that saw the deceased's body that among other injuries there was a ring of bruises around the neck. This was also confirmed by the post mortem examination findings. Then there was also the evidence of PW2 that the deceased died on the way to PW3. For us, this was evidence that could stand on its own and explained how the bruises around the neck came to be caused.

The evidence of PW2 highlighted above taken together with the evidence of PW3 and the appellant's own evidence pointed to the only conclusion that the appellant was involved in the death of the deceased. As we have stated, he was the prime mover of the activities that led to the apprehension of the deceased. The deceased was in his custody until the time of his death. Therefore, the inference suggested by Mrs Marebesa that the deceased could have been assaulted and strangled after the appellant left him at Lali is not correct or even a possibility. As we have stated, the appellant was

already dead or he was left for dead when the appellant and his party left him at Lali.

Coming to Mrs. Marebesa's alternative argument relating to the case of **Francis Mayaba**[2], in that case, the charge was reduced from murder to manslaughter on facts that are distinguishable from those in the present case. As seen from the holding in that case the facts of the case did not support a conviction of murder because quite apart from the element of provocation and drunkenness negativing intent to kill, that was a case of mob instant justice and there was no evidence to show that the appellant delivered the fatal blow that caused the death.

In the case before us there were no issues of provocation or drunkenness. Neither was the appellant a part of a mob justice group. The appellant got himself in the predicament arising from his pursuit of the alleged thieves of his cattle. Unfortunately, he handled the deceased in a manner that led to the deceased's death. There can

be no merit in this appeal and we dismiss it. We, accordingly, uphold the conviction.

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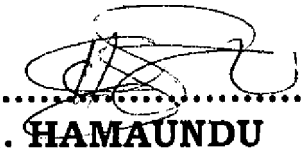
**E.N.C. MUYOVWE**
**SUPREME COURT JUDGE**



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**E.M. HAMAUNDU**
**SUPREME COURT JUDGE**

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**J. CHINYAMA**
**SUPREME COURT JUDGE**