

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

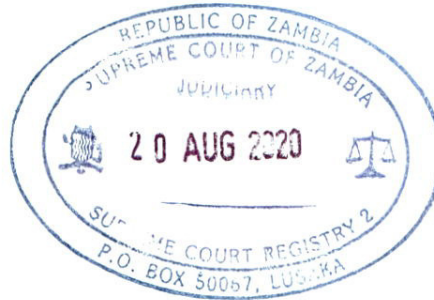
APEAL NO.116/2020

BETWEEN:

NDELEMANI BANDA

V

THE PEOPLE



APPELLANT

RESPONDENT

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 11th August, 2020 and 20th August, 2020

For the Appellant : Mrs S.C. Lukwesa, Senior Legal Aid Counsel

For the State : Mrs M. C. Kabwela, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Case referred to:

John Mkandawire v The People (1978) ZR 46

This appeal is against conviction.

The appellant was charged with murder before the High Court at Lusaka, presided over by Mwanamwambwa, J, as he then was.

It is not in dispute in this case that the deceased Isaiah Muzaza was beaten to death on the night of the 14th April, 2007 in the Kasupe area of Lusaka.

Of the evidence that was presented before the High Court, only the testimony of two witnesses was incriminating the appellant. PW1, Given Kaande, told the court that on the fateful night he found a group of people assaulting the deceased, whom he immediately recognized. Among the assailants, he also recognized the appellant and his brother named Zulu, both of whom were people that he knew. The reason the deceased was being beaten, according to what the witness gathered at the scene, was that he had stolen a phone belonging to the said Zulu. According to the witness, he told the group to stop beating the deceased and take him to the police, instead. At that point, a number of those people left. But the appellant and his brother Zulu refused to stop beating the deceased. When the deceased was put on a vehicle whose driver had offered to drive the deceased to the police, the appellant and his

brother pulled the deceased off the vehicle. The witness then left the appellant and his brother still beating the deceased. The next morning, the deceased was found dead by the roadside.

PW2, Joseph Lupiya, also gave similar testimony.

The appellant told the court that he had found a group of people beating a person who had stolen a phone belonging to his brother, Zulu. However, he denied participating in the beating. He said that he was merely a by-stander.

The court rejected the appellant's explanation and accepted the testimony of PW1 and PW2. The appellant was convicted and sentenced to death.

This appeal entirely hinges on identification. On behalf of the appellant, Mrs Lukwesa sought to cast doubt on the testimony of PW1. Counsel said that PW1 could have laboured under a mistaken impression as to what the appellant was actually doing at the scene. It was argued that when PW2's testimony is discounted, for being after the fact, what was left was only the evidence of a single identifying witness: in this case this was PW1. In this regard we were referred to the case of **John Mkandawire v The People**⁽¹⁾, a case, like many others before, and after, it in which we warned on

the treatment of the evidence of single identifying witnesses. In that case we held:

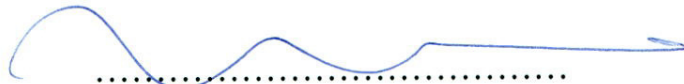
“The evidence of a single identifying witness must be treated with the greatest caution because of the danger of an honest mistake being made”

Mrs Lukwesa then argued that in this case the appellants explanation that he was a mere by-stander or passer-by could reasonably have been true and should have been accepted by the trial court.

For the prosecution, however, Mrs Kabwela argued that the trial court had properly ruled out the possibility of mistaken identity because PW1 had had the opportunity to talk to the appellant and even interacted with him for some time.

Indeed in cases where we have cautioned about the evidence of single identifying witnesses we have done so on the basis that the witnesses had never known the accused previously. In this case, the appellant was well known to PW1. According to the appellant's testimony, there came a time when the other assailants left the scene but the appellant and his brother continued beating the deceased. Infact, according to PW1, the appellant and his brother

were left by the witnesses at the scene, still beating the deceased. We do not see how, in those circumstances, PW1 could have mistaken the role that the appellant was playing at the scene. The trial court, therefore, properly found that the appellant had participated in the beatings. We find no merit in the appeal. We dismiss it.



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E. N. C. Muyovwe
SUPREME COURT JUDGE



.....
E. M. Hamaundu
SUPREME COURT JUDGE



.....
J. Chinyama
SUPREME COURT JUDGE