

IN THE SUBORDINATE COURT OF THE THIRD-CLASS

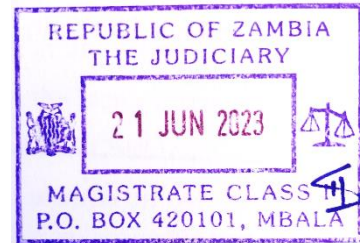
3D/27/23

FOR THE MBALA DISTRICT

HOLDEN AT MBALA

(Criminal Jurisdiction)

BETWEEN:



THE PEOPLE

AND

ISAAC SINDALA

Before: Hon. Deeleslie Mondoka

For the State: Mr. W. Chavula, Public Prosecutor, National
Prosecution Authority.

For the Accused: In person

JUDGMENT

Cases referred to:

- i. Mwewa Muroño v. The People (2004) Z.R. 207 (S.C.);
- ii. Saluwema V The People (1965) ZR 4 (CA);
- iii. Adam Bweupe and Dennis Bweupe V The People SCZ Appeal No. 251 and 252 of 2014;
- iv. Nzala v. The People (1976) Z.R. 221;
- v. Chimbo and Others v. The People (1982) ZR 70;
- vi. Kambarage Mpundu Kaunda v. The People (1990-1992) ZR 215
- vii. Partford Mwale V The People CAZ Appeal No. 8 of 2016;
- viii. Yokoniya Mwale v. The People (Appeal No. 205/2014) the apex court;
- ix. Guardic Kameya Kavwana v. The People (Appeal No. 84/2015), and

- x. Abedinegal Kapesh And Best Kanyakula V The People Scz Selected Judgment No. 35 Of 2017

Statute and other sources:

- i. The Penal Code Act, Chapter 87 of the Laws of Zambia;
- ii. Witchcraft Act, Chapter 90 of the Laws of Zambia; and
- iii. Magistrate' s Handbook; 6th Edition (1991); E.J.

Introduction

- [1] The accused ISAAC SINDALA stands charged with one count of naming a person to be a wizard, contrary to section 3(a) of the Witchcraft Act Chapter 90 of the Laws of Zambia, and one count of using insulting language, contrary to section 179 of the Penal Code Act Chapter 87 of the Laws of Zambia.
- [2] The facts in this matter are that, the accused on 30th April, 2023 at Mbala, in the Mbala District of the Northern Province of the Republic did name one JOHN SICHIVULA to be a wizard and that on the same night the accused did use insulting language and did conduct himself in a manner likely to give provocation to JOHN SICHIVULA as to cause him to break public peace.
- [3] On 5th May, 2023, the accused person was made to stand trial, and were arraigned on both charges herein, to which the accused pled NOT GUILTY on both counts.

Background facts

Prosecution' s case

- [4] The facts surrounding this matter are by and large– a conspectus of the facts established at trial.
- [5] On 10th, May 2023, the prosecution called as its first witness, PW1, JOHN SICHIVULA: aged 48 years, a general worker at OLAM Coffee Estate Company– Northern Coffee Corporation Limited (NCCL), of Zambia

compound Mbala, in the Mbala district of the Northern Province, testified as hereunder.

- [6] The onset of the matter being that– on 30th April, 2023, PW1 was indoors in the company of his family members, when the accused and his friends in tow, pulled-off a nocturnal scout about PW1 at his premises at around 22:00hrs, during which time the accused hurled a stream of damnable invectives; coupled with the fact that the accused styled PW1 as a wizard, which epithet made PW1 frightfully vexed!
- [7] PW1, came outside the house and knew *tout de suite* that the unsettling air of menace was coming from the accused, as PW1 could discern– from the familiar inflections of the accused’ s voice and the fact that he conveniently stood within PW1’ s line of sight– a paltry eight (8) metres away from PW1 when this was happening.
- [8] On the evening in question– the accused, ascribed the killing of his grandparents to PW1. During the said time the accused’ s friends kept mum, but were seen taking placatory steps with the hope of encouraging the accused from riding roughshod over PW1. Suffice (it) to say, the accused was in that moment– the bane of PW1.
- [9] PW1 feared for his safety and was overwhelmed with disquietude as to the extent the accused would manifest his laddish behaviour that, PW1 was, to coin a phrase– unable to leave the parameter of what he perceived to be his ‘safety net’ . PW1 avoided altogether the temptation to grasp the nettle– approach and apprehend the accused, seeing as he was altogether overwhelmed, as the whole madness gave him the *heebie jeebies*.
- [10] When the whole fracas petered down– PW1 reported the incidence to the headman, with the hope that the accused got called on the carpet for his indiscipline– and by so doing, call a halt to the accused’ s despicable behaviour.

- [11] Consequently, the matter was reported to the police.
- [12] Remarkably, PW1 was nonplussed during cross examination and the accused challenged the credibility of the testimony given by the PW1. And in teasing out the truth from PW1, the accused was astounded as to why PW1 would be affected by the sentiment if he was not a wizard.
- [13] Nothing was advanced in re-examination.
- [14] On 16th May, 2023, when the matter came up for continuation of trial, the prosecution allied PW1' s testimony with that of PW2– a vicenarian, of Zambia Compound, in Mbala in the Mbala district of the northern province. Who rehearsed vociferously as hereunder.
- [15] By PW2' s recollection, it was on a Sunday– PW1 and PW2 were in the house at around 22:00hrs, when the accused descended upon the house of PW1 in the company of his friends.
- [16] PW1 and PW2 came out of the house and the accused was blaring unpalatable language at PW1. We were about 8 metres from where he was standing. He mentioned that PW1 had killed the accused' s grandparents.
- [17] in his testimony PW2 indicated that the accused was not a stranger, and that PW2 had known him since 2014.
- [18] In the process of the accused disturbing the peace his two friends kept restraining him.
- [19] The witness made a dock identification of the accused.
- [20] PW2 indicated that the matter was reported to the headman, who advised PW1 and PW2 to report the matter to the police.
- [21] PW2 when under the mill of cross-examination intimated, that there was a LUKA SIMPOKOLWE who had also witnessed the disturbance.
- [22] Further, PW2 admitted that PW1 and the accused had differed some time back. It was also established that during the ruckus on the 30th of April, 2023, some neighbours were present.

- [23] No issues were advanced in re-examination.
- [24] On 10th May, 2023, the state called as its last witness, PW3, a constable by the name of MWANSA AUBREY, a tricenarian of Little Polland, who related as hereunder.
- [25] On 6th June, 2023, whilst on duty, I was handed a docket of using insulting language, were one male JOHN SICHIVULA, aged 48 years old of Zambia Compound in the Mbala district in the Northern Province of Zambia. The same reported that he had been insulted by male ISAAC SINDALA of the same neighbourhood.
- [26] The matter occurred on 30th April, 2023, at around 22:00hrs at the complaints home. The same was in the company of his family.
- [27] Acting on the same docket I ascertained that the accused was already in custody. I interviewed the same, in connection with the subject offence. The accused gave an alibi that he was at home on the night in question.
- [28] A warn and caution was administered to the accused in bemba, a language he fully understands, wherein the accused offered a voluntary statement to which the accused gave a flat refusal to having committed the subject offence.
- [29] PW3 summoned PW1 and asked him if he had a grudge against the accused, to which he said no. PW3 then proceeded to charge the accused with one count of using insulting language, contrary to section 179 of the Penal Code Chapter 87 of the Laws of Zambia.
- [30] During cross-examination it was established that the accused had arrantly gainsaid the charge.
- [31] There was no re-examination on the part of the state. The prosecution subsequently closed its case.
- [32] At the close of the prosecution' s case, the court then found the accused with a *prima facie* case to answer and put the same on his

defence pursuant to section 207 of the Criminal Code, Chapter 87 of the Laws of Zambia.

The Defence' s case

- [33] The defence called one witness who took up the cudgels to disavow the allegations: (i) in one count named a person to be wizard and (ii) in the second count, used insulting language, all levelled against the accused. The accused stood in the witness box as DW1 and gave sworn evidence with his particulars as per the record.
- [34] On the 13th of June, 2023, when the matter came up for defence, DW1 indicated that he would be a sole witness as his witness had since been transferred to Mbeya, and as it shall be observed hereinafter– DW1 gave his testimony on the back of an envelope, as it did not bear out the fact that he was not at PW1' s premises on the night in question, as was suggested by PW3.
- [35] On 1st May, 2023, DW1 received summons from Mbala Police Post. At the police station DW1 was informed that the reason he was there was that DW1 had insulted PW1.
- [36] Further, DW1 was taken into the CID' s office, but yet again he denied having committed the subject offence.
- [37] During cross-examination, DW1 and PW1' s familial relation was re-established. DW1 argued that PW1 lied in his testimony and that he had earlier challenged the same.
- [38] There were no issues raised in re-examination. And that marked the close of the defence' s case.

Facts in dispute

- [39] This was the gist of the evidence before me; considering the whole evidence, I found that the following facts are in dispute: the accused

persons disputes having insulted and being at PW1' s premises on the night in question; the accused disputes calling the PW1 a wizard.

Facts not in dispute

[40] The facts not in dispute are that: PW1 and PW2 were at PW1' s house on the night of the 30th of April, 2023; PW1, PW2 and the accused are related; that PW1 and PW2 have known the accused for a long time.

The law establishing the charge in *casu*

[41] The Penal Code Act, Chapter 87 of the Laws of Zambia in section 179 constitute the offence of using insulting language:

... “Every person who uses insulting language or otherwise conducts himself in a manner likely to give such provocation to any person as to cause such person to break the public peace or to commit any offence against the person, is liable to imprisonment for three months or to a fine not exceeding four hundred and fifty penalty units or to both.”

(Emphasis mine)

[42] Further section 3 of the Witchcraft Act, Chapter 90 of the Laws of Zambia established the offence of naming a person to be a wizard, and enacts in part as follows:

(a) Whoever – names or indicates or accuses or threatens to accuse any person as being a wizard or witch; or(b).....; or (c) shall be liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or to imprisonment with or without hard labour for any term not exceeding one year, or to both; provided that this section shall not apply to any person who makes a report to a police officer of or above the rank of Sub-Inspector or, where there is no such police officer, to a District Secretary or an Assistant District Secretary. (Emphasis mine)

[43] Thus, the accused are entitled to give and or call evidence or say nothing at all and if they elect to remain silent this does not in any way

shift the burden from the prosecution to prove the guilt of the accused to the required standard as herein articulated.

Analysis of the law; facts and determination

[44] From the outset, I cautioned myself that– in criminal cases the onus is squarely on the prosecution to prove their case, as per the Supreme Court’ s position in re Mwewa Muroño v. The People (2004) Z.R. 207 (S.C.), where it held inter alia that:

... “criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution... The standard of proof must be beyond all reasonable doubt” . (Emphasis mine)

[45] Consequently, if the accused persons case is ‘reasonably possible’ , although not probable, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof. And if upon considering the evidence adduced there is reasonable doubt on the mind of the court as to the guilt of the accused, the court will return a verdict of NOT GUILTY. Saluwema V The People (1965) ZR 4 (CA).

Was an alibi properly established

[46] Thus, in teasing out the truth, I ask the question – when should the accused persons’ defence be raised? Well. Swarbrick, in the Magistrate’ s Handbook; 6th Edition (1991), quotes a passage in re of Ballard v The Queen (1958) Cr. App. Rep. 1, decision by the Privy Council, which say:

[47] ... “the accused (person) must raise the defence by sufficient evidence fit to go to the jury, in other words, the evidential burden is on him...

the (prosecution) is not called upon to anticipate such a defence and destroy it in advance. The accused, by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two must place before the court such material as makes the defence a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the (prosecution) to destroy that defence in such a manner as to leave in the jury' s mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." (Emphasis mine)

[48] Furthermore, *in re Donald Fumbelo v The People SCZ Appeal No.476/2013*, the Supreme Court held inter alia that:

... "where an accused person does not contradict Prosecution witnesses during cross examination, he is likely to be disbelieved when he brings up his own version of the story for the first time during his defence." (Emphasis mine)

the Supreme Court went further to assert that:

... "when the accused person raises his own version for the first time only during his defence, it raises a very strong presumption that his version is an afterthought and therefore less weight is attached to such a version" . (Emphasis mine)

[49] Granted– the accused person raised the alibi at the police– before commencement of trial and the same was iterated during trial in the testimony of PW3– the same was not adeptly established. How so? One may wonder.

[50] Well, the Court of Appeal in *Adam Bweupe and Dennis Bweupe v. The People SCZ Appeal No. 251 AND 252 of 2014*, echoed the Supreme Courts position *in re Nzala v. The People (1976) Z.R. 221* It is the duty of the police to investigate an alibi given by an accused on apprehension or arrest but where there is no evidence to support the

alibi or where no sufficient details are given to the police, there is no obligation by the police to investigate such alibi; the accused person has the onus to give sufficient details to enable the police to investigate.
(Emphasis mine)

- [51] In the case in *casu*, DW1 pinned his hope on the alibi that– “he was at home” , which position I find sketchy, as it does not avail to the police the requisite details to facilitate investigations of the said alibi. I, with *bounded rationality*– find this explanation and or evidence to be exiguous and cannot to itself amount to a proper defence of alibi, seeing as the same is bereft of materiality and pertinent details for the police to work with.
- [52] More to the point– I find no long-term utility in positing an alibi only for the accused (DW1) to capitulate to the prosecution’ s witnesses through DW1 implicitly disaffirming his defence by subtly flirting with the suggestion and or possibility of having been present at PW1’ s house on the evening in question when the accused during his cross-examination of PW1 sloppily adverted that– why would PW1 be offended for being billed as– a “wizard” if PW1 was not a wizard?
- [53] In my reverential view, the defence of alibi should not be given to caprice– but should be to itself ironclad that no intimations or compelling sentiments by the prosecution would excite in the accused person the need to give the impression that he might have been at the scene on the night in question.
- [54] Having established that the alibi advanced by the accused does not in proper context meet the defence, the inevitable corollary is that I adopt and nod sagely with the prosecution’ s version of the facts.
- [55] And going by the facts in question. I will go out on a limb here and say– I would not in good conscious buoy up the calling of someone as a witch considering the potential for evil that such a signature would

give rise to on the person so accused, in this case, PW1. I will speak to this point a little more *anon*.

[56] And without further ado, there is need to establish for a fact the quality of the identification by the prosecution's witnesses in this matter. The undisputed facts herein are that— PW1 and PW2 were at PW1's house at around 22:00hrs in the night and in their testimonies, the same testified that the accused was a trifle eight (8) meters away from where they stood and given the time within which the whole issue happened, could not have possibly mistakenly identified the accused, as they had the benefit of recognition having known the accused (DW1) for the better of their lives.

[57] Hence, having warned myself sufficiently, I am satisfied that PW1 and PW2 could not have been constrained on the basis of propinquity and auditorial clarity, as to fail to recognize the accused (DW1) as the same was not only within their line of sight, but earshot as well— notwithstanding the cover of dark. I therefore exclude the possibility of an honest mistake. My resolve is bolstered by the case of Chimbo and Others v. The People (1982) ZR 70.

[58] Further, I am alive to the fact that as a trial court I need to tread gingerly when considering the testimony of a friend and relative, as relatives or friends of a victim have a documented tendency to skew and or give sidelong versions of the facts, as they may possibly have an interest of their own to serve and their evidence should thus be treated with utmost caution and in the same way as evidence of suspect witnesses.

[59] Following from the same, the supreme court in Kambarage Mpundu Kaunda v. The People (1990-1992) ZR 215 guided *inter alia* that:

... "as relatives and friends of the deceased may be witnesses with an interest to serve, it was incumbent upon a court considering evidence from such witnesses to warn itself against the dangers of false

implication, and that the court must go further and exclude such danger.” (Emphasis mine)

[60] And the Court of Appeal in re Partford Mwale V The People CAZ Appeal No. 8 of 2016, when it echoed the sentiment:

[61] ... “A conviction will be safe if it is based on the uncorroborated evidence of witnesses who are friends and relatives of the deceased, or the victim, provided that on the evidence before it, those witnesses could not be said to have a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What was key was for the court to satisfy itself that there was no danger for false implication” . (Emphasis mine)

[62] In view of the foregoing, I cannot decidedly discount the testimony of PW2, without running the risk of misstating. Thus, I see no credible basis upon which to decry the witness of PW2, as I have not noticed a tinge of false implication or ill motive, besides the inviolable fact that DW1 in his testimony denies having differed with PW1. That said, I accept the testimony of PW2 without demur and I see no danger of false implication.

[63] Further, my decision is fortified by the following cases: In Yokoniya Mwale v. The People (Appeal No. 205/2014) the apex court stated that:

[64] ... “We are of the firm view that insistence on the position that the evidence of every friend or relative of the deceased or the victim must be corroborated, is to take the principle in the case authorities on this point out of context.” (Emphasis mine)

[65] In the later appeals, case in point, *in re* of Guardic Kameya Kavwana v. The People (Appeal No. 84/2015), it was observed that:

...” there is no law which precludes a blood relation of the deceased from testifying for the prosecution. Evidence of a blood relation can be

accepted if cogent enough to rule out any element of falsehood or bias.” (Emphasis mine)

- [66] And as a fitting *non sequitur*– it is undeniable that a belief in witchcraft has been deeply entrenched in the Zambian psyche. Perceived witches have in many of our communities been treated with untold mob violence and rough justice. Many of those accused of witchcraft have been ostracised by their families and communities; subjected to life threatening assaults; dehumanized; have had their property destroyed and in extreme cases, brutally murdered, as was the case with the deceased¹.
- [67] Further, for a rustic place like Mbala, where the *vox populi* is steep in superstition– sentiments and or naming someone as a witch or wizard could have dire consequence, as such would be fertile ground for disaster– as the bearer of such a signature would be subjected to brutal force, barbaric and sadistic treatment, i.e., lynching, leading inevitably to their deaths. Thus, it was not only careless, but dangerous for DW1 to style PW1 a wizard.
- [68] Further, if such a thought would even be whispered– it has the potential to engender harassment, persecution, starvation, abandonment, and death of people suspected to be witches. To be labelled a witch is, in many instances, tantamount to being declared liable to be killed - with impunity. Accusations of witchcraft frequently lead people, especially elderly men, and women, to forced displacement or voluntary migration from their ancestral villages. In fact, it is increasingly beginning to appear as if old age is synonymous with being a witch in many communities in Zambia. (Emphasis mine)
- [69] I am in no doubt whatsoever that accusations of witchcraft also present a very unsettling example of a lesser– known form of violence and

¹ Abedinegal Kapesh and Best Kanyakula V The People SCZ Selected Judgment No. 35 Of 2017

discrimination, to which elderly people, especially, case in point PW1, in our communities are subjected to daily. Witch trials and the persecution and stigmatisation of people, particularly older citizens, on preposterous charges of involvement in witchcraft, even on the slimmest of evidence, is predicated on the widespread belief in witchcraft.

[70] And the belief in witchcraft *per se* is not necessarily problematic; it is the actions taken in consequence of that belief which are. These, as we have pointed out already, violate a whole range of human rights including the right to life, liberty, and security; the right to privacy; the right to hold property and in some cases the prohibition against torture. These are all rights recognized in the bill of rights of our Constitution, Chapter 1 of the laws of Zambia. And if we take the liberty to veer into the international human rights arena, we would immediately note that social ostracism resulting from accusations of witchcraft also violates the International Covenant on Civil and Political Rights which Zambia has ratified. That covenant protects against “arbitrary or unlawful interference with an individual's privacy, family, home and correspondence and against unlawful attacks on an individual's honour and reputation.”

[71] At this point, it is a foregone conclusion that the accused did indeed name PW1 as a wizard, which signature incensed PW1.

[72] Finally, touching the issue of using insulting language pursuant to section 179 of the Penal Code Act, Chapter 87 of the Laws, I am of the considered view that merely using threatening or abusive language should not be outlawed in this way. The clear problem with the criminalization of insults is that too many things can be interpreted as such—insults! Criticism is easily construed as insults by certain parties. Ridicule is easily construed as insults. Sarcasm, unfavourable

comparison, merely stating an alternative point of view to the orthodoxy can be interpreted as an insult. And because so many things can be interpreted as insults– it is hardly surprising that so many things have been, construed as insulting language as is case with PW1 and the accused.

[73] Although the herein law under discussion has been in the statute book in excess of 20 years– the same when misapplied is a trifle symptomatic of a culture that may with reasonable and well-intended ambition to contain obnoxious elements in society, create a society of an extraordinarily authoritarian and controlling nature. It may engender what can be styled– ‘contemporary intolerance’ . And when not well prosecuted– it is strikingly an intense desire to gag uncomfortable voices of dissent, as may have been the case with the accused and PW1.

[74] Supplementary, the incessant need to police insulting language can be counter progressive, as the same is open to abuse by persons in whom power resides. I hold the view that– underlying prejudices, injustices or resentments would not be efficaciously addressed by arresting people: they are addressed by the issues being liberally aired, argued, and dealt with preferably outside the legal process.

[75] Thus, a more evolved approach to dealing with the issue of insulting language would be– to increase society’ s resistance to insulting or offensive speech by inoculating ourselves against it; hunker down and possibly develop thicker skin. We need to build our immunity to taking offence, so that we can deal with the issues that perfectly justified criticism can raise.

[76] In view of the foregoing, I am virtually persuaded that the state through its evidence has not unimpeachably established a proper and potent enough cause upon which a conviction can be secured on the basis of

insulting language, as what is arrantly crisp is that– PW1’ s feelings were injured on account of the accused’ s actions and not that the law was broken *per se*, which argument I find feeble.

[77] Nevertheless, when viewed in the round– the prosecution has painstakingly built an irrefragable case on one count of naming someone to be a wizard, as little has been advanced by the accused to ward off the charge in question, except to advance a tenuous alibi, as has been established hereinbefore.

Verdict

[78] In conclusion, the state has proved its case beyond reasonable doubt on one count of naming someone to be a wizard, contrary to section 3(a) of the Witchcraft Act, Chapter 90 of the Laws of Zambia.

[79] Consequently, there is no lingering doubt that the offence in question was committed by the accused person herein.

[80] (a) In the first count, of naming a person to be a wizard, contrary to section 3(a) of the Witchcraft Act, Chapter 90 of the Laws of Zambia, I find the accused GUILTY as charged. Therefore, I CONVICT the same on this count accordingly.

(b) In the second count, of using insulting language, contrary to section 179 of the Penal Code Act, Chapter 87 of the Laws of Zambia, I find the accused person NOT GUILTY as charged.

[81] IRA WITHIN 14 DAYS.

JUDGEMENT DELIVERED AT MBALA IN OPEN COURT ON 21ST JUNE, 2023



DEELESIE MONDOKA
HON. MAGISTRATE