IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 10,11/2022
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

BENSON MWAKESO **1ST APPELLANT**

ENOCK SIMUNYOLA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sichinga and Muzenga, JJA
On 23rd, 24th August 2022 and 26th March 2024

For the Appellant: Mr. H. M. Mweemba, Acting Director & Mrs. M. T. Mulubwa, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C. K. Sakala, State Advocate, National Prosecution Authority

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JUDGMENT

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Phiri and Others v. The People (1973) ZR 47**
2. **The Attorney-General v. Marcus Kampumba Achiume (1983) ZR1**
3. **Mhango and Others v. The People (1975) ZR 275**

4. **William Muzala Chipango and Others v. The People (1978) ZR 304**
5. **Machobane v. The People (1972) ZR 101**
6. **Simon Malambo Choka v. The People (1978) ZR 243**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellants were sentenced to death by Pengele J following a conviction of murder in the High Court. They have appealed against the conviction and sentence on the basis that the trial court convicted the appellants on insufficient evidence.

1.2 The particulars of the offence alleged that on 26th December 2019 at Kasempa in the North-Western Province of the Republic of Zambia, the appellants murdered Evas Musonko.

2.0 PROSECUTION EVIDENCE BEFORE THE TRIAL COURT

2.1 A summary of the prosecution evidence in the trial court was that on 26th December 2019, the first appellant, PW1, PW2 and a person called Chris got onto a white Toyota Ipsum motor vehicle around 18:00 hours. The vehicle branched off to an area where there were no

houses, on a narrow road. PW1 raised concern about the direction the vehicle was taking.

2.2 The first appellant then told the driver to stop and the three disembarked. The vehicle then moved a few metres and it stopped. They then heard someone crying that **"Why have you killed me Ben Mwakesa, I know you"** (as per PW2) – **"You have injured me"** as per PW1. Then the first appellant was heard speaking to someone on the phone saying, **"*fikonka* I have followed your instructions by hitting him once but he has not died."** The first appellant came back to where the trio were and told them that he had followed the instructions. He returned to check on the vehicle and he came back and reported that the person had driven off. He warned the trio not to tell anyone and that they would be paid. Around 21:00 hours, PW5 received a phone call that his friend was attacked and was along Solwezi-Kasempa Road. He picked him up and took him to the hospital and died four days later.

2.3 This marked the end of the prosecution case. The appellants were found with a case to answer and they were put on their defence.

3.0 DEFENCE

3.1 In their defence, the appellants opted to give sworn evidence and called no witnesses. The first appellant explained that he was a cleaner at Mukinge Mission Hospital and that on 22nd December 2019 when he knocked off from work around 12:00 hours he went to his sister's home to get some traditional medicine for his epilepsy. He narrated that while at his sister's place, a motor vehicle for the Criminal Investigations Officer (CIO) went to his sister's place.

3.2 He told the trial court that he did not know why the police were following him. He denied knowing PW1 and PW2. He also denied knowing the second appellant. He also denied having anything to do with the murder. He denied ever booking a motor vehicle since he was born.

3.3 In his defence the second appellant testified that he was businessman who owns Fikonka Bar and Fikonka Shop. He told the trial court that the day he was apprehended on 22nd December 2019 he was at his shop from 09:00hours to 21:00 hours and that he was apprehended on 30th December 2019. He denied knowing the first appellant. He accepted knowing PW2 but denied the allegation that PW2 went to him

to look for piecework. He further refuted PW2's testimony that he told PW2 about the job of removing teeth, nails, hearts and private parts. He told the trial court that he had been running his bar called Fikonka in Kasempa since 2000 and that he was well known as Fikonka in Kasempa.

3.4 In responding to the allegation that the first appellant called him to report that he had carried out the job as instructed, he stated that he was not there and he did not know the first appellant, PW1 and PW2. He denied having anything to do with this offence.

3.5 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence before him, the learned trial judge found that the PW1 and PW2 were kept at the police for their safety as the situation in Kasempa at the time was volatile and the citizens wanted to kill them. The trial court further found that PW1 and PW2 were participants in the commission of the offence and believed their evidence. All in all the trial court concluded that the prosecution had proved the case beyond reasonable doubt. Subsequently, the appellant was convicted and sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Embittered with the conviction, the appellant filed two grounds of appeal couched as follows:

(1) The trial court erred in law and fact when the court found that the first appellant remained in the vehicle and hit the deceased with an object. The said findings of the court were not supported by the evidence on the record.

(2) The learned trial court erred in law and fact when the court found that the second appellant procured the first appellant to kill the deceased in this matter.

6.0 THE APPELLANT'S ARGUMENTS

6.1 The gist of the appellant's argument in support of ground one of the appeal was that none of the eyewitnesses saw the first appellant hit the deceased and that neither did they see the murder weapon. It was the learned counsel's submission that the alleged murder weapon was never brought before the court and neither was the car in which they rode in, brought to court for identification.

6.2 According to learned counsel, the evidence of **'last seen'** constitutes circumstantial evidence, and the trial court did not address its mind to eliminate other inferences that the deceased could have been attacked by anyone and additionally, there were two people at the roadside

where the deceased was found. We were referred to the case of **Phiri and Others v. The People**[1] in which the Supreme Court ruled that:

> **"Courts are required to act on the evidence placed before them. If there are gaps in the evidence the courts are not permitted to fill them by making assumptions adverse to the accused if there is insufficient evidence to justify a conviction and courts have no alternative but to acquit the accused."**

6.3 It was further contended that courts are not at liberty to infuse their own inferences which go contrary to the evidence and to the detriment of the accused person.

6.4 It was the counsel's further submission that the prosecution evidence had a lot of discrepancies. It was pointed out that PW1 and PW2 stated that the Ipsum was white in colour while PW5 who found the deceased leaning on the car said the Ipsum was greyish and black in colour. It was submitted that the discrepancies in the evidence of PW1 and PW2, the key witnesses of the prosecution on this vital piece of evidence are critical and the trial court erred in ignoring it.

6.5 In support of the second ground of appeal, it was submitted that there is no evidence on the record adduced by the prosecution to show that indeed the first appellant called the second appellant and no phone call

records were produced by the prosecution. All in all, it was submitted that there is no evidence linking the second appellant to the crime.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, the learned counsel in responding to ground one of the appeal contended that the respondent support the conviction and sentence. Counsel contended that this appeal is based on the finding of facts by the trial court. It was the counsel's submission that it is clear from the record that the appellants were implicated in the commission of the offence mainly from the evidence of PW1 and PW2 which the court believed.

7.2 It was submitted that although the 1st appellant attempted to account for his movements on the said date, the trial court rightly dismissed his version as not being reasonably possible. It was submitted that during the commission of the crime, the trial court found as a fact that the 1st appellant remained in the vehicle with the deceased. The collective prosecution evidence places both appellants and the deceased at the scene of the crime. It was learned counsel's further submission that there is direct evidence which connects the 1st appellant to the crime

and the trial court rightly found so. That PW3 further corroborated the evidence of PW1.

7.3 As regards the 2nd appellant, it was submitted that the trial court found that there was sufficient circumstantial evidence to connect him to the crime given the evidence of PW2.

7.4 It was submitted that this appeal is premised on the findings of fact by the lower court. It was submitted that the trial court made proper findings of fact that cannot be faulted. We were urged not to interfere with the findings of facts of the lower court. We were referred to the case of **The Attorney-General v. Marcus Kampumba Achiume.**[2]

7.5 We were further urged to dismiss this appeal and uphold the conviction and sentence.

8.0 THE HEARING

8.1 At the hearing of this appeal, the learned counsel for the appellant Mr. Mweemba informed the Court that he would rely on the filed heads of arguments and the learned counsel for the respondent Mr. Sakala, informed the Court that the State would submit *viva voce,* which he did.

9.0 DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the heads of argument filed by counsel and the judgment appealed against. The issue in this appeal is whether the evidence on the record is sufficient to support the appellant's conviction.

9.2 We wish to note on the onset that the evidence against the appellants is given by PW1 and PW2. The learned trial court found these two witnesses to have been accomplices and proceeded to believe them, even in the absence of corroboration. The Supreme Court has in a plethora of cases guided on how to treat accomplice evidence.

9.3 In the case of **Mhango and Others v. The People,**[3] the Supreme Court held that **"when evidence is purely of accomplices it should not be relied upon in the absence of corroboration save for special and compelling circumstances."** Further, in the case of **William Muzala Chipango and Others v. The People,**[4] the Supreme Court held *inter alia* that:

> **"(ii) Where because of the category into which a witness falls or because of the circumstances of the case he may be a suspect witness that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an**

interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded.

(iv) The trial judge having appreciated that the witnesses in question might be accomplices or might have purposes of their own to serve, it was a misdirection to accept their evidence without looking, for corroboration or support."

9.4 The learned trial court therefore fell in grave error when it accepted the evidence of PW1 and PW2 in the absence of corroboration. It is not enough for a trial court to believe the evidence of an accomplice or a suspect witness. The court must go further to look for corroboration. When there is no corroboration, the court must look for evidence of something more or what is referred, in **'Machobane terms'** (**Machobane v. The People**[5]), as **'special and compelling grounds,'** which, though not amounting to corroboration, effectively rules out the dangers of relying on the uncorroborated evidence of such a witness. Further PW1 and PW2 cannot corroborate each other as their interest is the same (see the case of **Simon Malambo Choka v. The People**[6]).

9.5 It follows therefore that the appellants' convictions are not safe and must on this score be set aside.

9.6 Even if it were to be found that there was corroboration for the evidence of PW1 and PW2, the appellant's conviction would still be on very shaky ground. We say so because the appellant's conviction was based on the trial court finding that the 2nd appellant procured the 1st appellant to kill the deceased. The evidence given by PW1 and PW2 was to the effect that the 1st appellant told them that he had hit the driver of the white Ipsum vehicle, after which they heard him speaking on the phone, allegedly speaking with the 2nd appellant that he had carried out the job as assigned. No call records were brought before court to confirm the making of such a call as rightly argued by learned counsel for the appellant. It is therefore not known whether the phone conversation, if it took place, was between the 1st appellant and the 2nd appellant.

9.7 Further, the person who was allegedly attacked by 1st appellant drove off with the vehicle. The deceased herein was found leaning against a greyish and black Ipsum along Kasempa Road. The place of the alleged attack is far from where this vehicle was found and the colours

of the two vehicles are different, though the makes were the same. PW1 and PW2 never identified the deceased herein in order to confirm that he is the one on whose vehicle they boarded. The motor vehicle was equally never brought to court, neither was it identified as the one which they saw that evening. The gaps in the prosecution evidence seriously weakens the prosecution case. As correctly argued by learned counsel for the appellants, and as was held by the Court of Appeal, the precursor to the Supreme Court in the **Phiri and Others case** *supra,* that it is not the duty of a court to fill in the gaps in prosecution evidence.

9.8 Therefore, whatever the case, the convictions are not safe. Had the learned trial court properly directed himself, he would no doubt have reached the verdict as ours. Consequently, we set aside the convictions. We agree with learned counsel for the appellant that the learned trial court fell into grave error when he convicted the appellants. We therefore find merit in the appeal and we allow it.

10.0 CONCLUSION

10.1 Having found merit in the appeal, we allow it. The appellants' convictions and sentence are set aside. The appellants are acquitted and set at liberty forthwith.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE