

APPEAL NO.43/2020

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

BETWEEN:

LEVY CHUNI
CHRISTOPHER LIKUPE

1ST APPELLANT
2ND APPELLANT

V

THE PEOPLE**RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS

On 11th August, 2020 and 20th August, 2020

For the Appellants : Mrs. Z. Ponde, Legal Aid Counsel

For the State : Mrs C.M. Hambayi, Deputy Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mwewa Murono v The People (2004) ZR 207**
2. **George Nswana v The People (1988-1989) ZR4 174**
3. **Martin Mupeta and another v The People, SCZ number 137 of 2012**

The appellants appeal against their conviction for the offence of murder.

The two appellants were brought before the High Court at Lusaka, presided over by Chawatama J, on 5th May, 2014 on the said charge of murder. They were alleged to have murdered Morgan Mofya Mumba on 27th April, 2007.

We should point out that this was the fourth judge before whom the appellants were appearing, on the same facts. The appellants had first appeared for trial in 2008. The trial had progressed up to 2009 when, for some administrative reason, the first judge was unable to proceed with the matter. By then the matter had reached the defence stage; and, notably, the prosecution had produced and handed to the court all their exhibits. There then followed two abortive attempts at holding a fresh trial, before two different judges. Then in 2014 trial was finally held before judge Chawatama. By then some witnesses who had testified in the first trial had either died, or could not be located: Of particular note is

the fact that all the exhibits that had been produced in the first trial could not be found.

The facts before the trial court were these: In February, 2007, Faith Maunga, PW2, received a motor vehicle from her sister who lived in Kabwe. The car was a Toyota Sprinter, with registration number ABG 2904. PW2 used the vehicle as a taxi. The deceased was the driver. During this time, PW2 bought what was known as a 'jembe' phone. This was a type of phone which people could buy and then operate as a payphone. She had intended to run a little business on those lines. While she was trying to find someone to run the business, and a place to operate the phone from, the deceased kept that phone in the boot of the said motor vehicle. The phone had a number by which it could be called.

On 27th April, 2007, the deceased decided to use the taxi at night as well. That was the last time he was seen alive. When he did not come back the following morning, PW2 and the deceased's relatives mounted a search for him. They looked for him in hospitals, mortuaries and police stations, but to no avail. Indeed many days passed, but there was virtually no trace of the deceased and the motor vehicle.

In the meantime, a few days after the deceased had disappeared, the 2nd appellant showed up in Mongu with a motor vehicle of similar make with the one that the deceased used to drive. He sold the motor vehicle to Elvis Silishebo and his wife, Getrude Hatyoka, PW3 and PW4 respectively. The 2nd appellant does not deny this. PW3 and PW4 told the court that the 1st appellant was with the 2nd appellant when the latter sold them the vehicle. Even the 2nd appellant in his testimony placed the 1st appellant in Mongu at the time of the sale. The 1st appellant, however, insisted before the court below that he was never, at any time, in Mongu.

The motor vehicle at that time was not bearing any registration number plates. PW3 and PW4 paid the 2nd appellant a deposit of K5000 (rebased). The parties then signed a letter of sale. The witnesses told the court that the two appellants left for Lusaka, with the 2nd appellant promising to go and complete the registration process for the vehicle, whose registration number was to be ABJ 1310.

A few days later, however, the two appellants were in Mumbwa where the 1st appellant had hidden, at his mother's homestead,

another motor vehicle which was similar to the one that was sold in Mongu. Unknown to them, a resident of the village, being suspicious that the vehicle may have been stolen, had reported to the police. The police then apprehended the appellants. When they were searched at the police station, the 1st appellant was found with the letter of sale for the vehicle that was sold in Mongu. The 2nd appellant was found with a road licence disc bearing the registration number ABG 2904. The appellants were taken to Mongu where the motor vehicle that was sold by the 2nd appellant was retrieved. They were taken back to Mumbwa, together with the vehicle. The police then sent messages to other stations in the country for any reports on them. There was an immediate response from the police in Lusaka, who confirmed having received a report that a motor vehicle bearing registration number ABG 2904 had been stolen. Later, a check on the engine and chassis numbers of the vehicles revealed that it was the vehicle that was sold in Mongu that had borne registration number ABG 2904.

During the same week, on 7th May, 2007, grave diggers at Leopards Hill Cemetery in Lusaka found a body in one of the graves that was yet to be used. The body was tied by the hands and feet.

The police were called in. Photographs of the body were taken. The following day, on 8th May, 2007, postmortem on the body was conducted and the body was buried. At that point, no one linked that body with the motor vehicle that was being kept at Mumbwa police station. There was evidence that the relatives of the deceased in this case had been called to identify the body by looking at the photographs that had been taken, but they failed to identify the body in those photographs.

While the motor vehicles and the appellants were still in Mumbwa, the relatives of the deceased were taken there. They identified the vehicle that was sold in Mongu as the one that the deceased used to drive. Going through the motor vehicle, they noted that the 'Jembe' phone was not there. The case was then transferred to Lusaka. The deceased's relatives gave the police the phone number for the 'Jembe' phone. When that number was called, it was found that someone was using it as a phone business on Mumbwa road in Lusaka. The user led the police to the owner of the business, who turned out to be the 1st appellant's young brother. The latter told the police that the 'Jembe' phone was given to him by his mother in Mumbwa, who was also the 1st appellant's

mother. The 1st appellant's mother was brought to Lusaka; and she confirmed that, indeed, the two were her children.

The police took the matter to court as a case of theft of motor vehicle. Then the deceased's relatives went back to the police and requested that the body of the person whose photographs they had earlier been shown be exhumed. This was done. The deceased's mother was now able to identify the body as that of her son. The appellants were consequently charged with aggravated robbery and murder. It appears, however, that the case of theft of motor vehicle proceeded up to its conclusion. Hence, the count of aggravated robbery was dropped from the charge herein. The trial of the appellants was now for murder only.

The 1st appellant told the trial court that he had bought the motor vehicle that was recovered in Mumbwa from a David Mumba; and that the sale was witnessed by the 2nd appellant. He also told the court that he had witnessed the 2nd appellant buying the vehicle that was sold in Mongu. He said that that was the only knowledge he had of that vehicle. He denied any linkage to the 'Jembe' phone. He also denied being in Mongu when the 2nd appellant sold his (2nd appellant's) vehicle to PW3 and PW4.

The 2nd appellant told the court that he bought his vehicle from a Godfrey Mfune, and that the sale was witnessed by the 1st appellant. He said that the registration number for that motor vehicle was ABJ 1310. He produced in court a letter of sale dated 20th April 2007 to support his evidence.

The trial court found that there was overwhelming evidence that the person who was found with the '*Jembe*' phone was the 1st appellant's brother, and that the phone was given to him by the 1st appellant's mother. The court rejected the 2nd appellant's letter of sale, saying that it was dated seven days before the disappearance of the deceased and, therefore, it could only have been in respect of a different vehicle. The court then noted odd coincidences such as that the 2nd appellant knew the names of the 1st appellant's mother and brother, and that the 1st and 2nd appellants had dropped off in Mumbwa together on their way from Mongu. The court concluded that the appellants committed the murder together. They were convicted and sentenced to death.

The appellants appeal on one general ground, couched as follows:

"The learned trial court misdirected itself in law and fact when it convicted the appellants on evidence not warranting a conviction"

To support their contention that the evidence did not warrant a conviction, the appellants argued that, for instance, the evidence on the '*Jembe*' Phone was only through the testimony of the arresting officer. They pointed out that the 1st appellant's brother was not called as a witness to confirm that the '*Jembe*' phone was found with him. They further pointed out that the '*Jembe*' phone was not produced in court nor identified by the owner, PW2, for the court to be satisfied that indeed a '*Jembe*' phone had been recovered in this case.

The State counter argued that in this case the exhibits that had been produced during trial could not be found when the re-trial was held. They argued also that some witnesses who had testified during the first trial were not available; the 1st appellant's brother could not be found, while the 1st appellant's mother had since died.

We agree with the State's submission. PW1 in her testimony did tell the court that she had seen the '*Jembe*' phone at court during the first trial. PW1 also told the court that she had seen the

1st appellant's young brother at the police station whilst he was in possession of the '*Jembe*' phone, after it was traced. Therefore, we can say that it was indeed produced during the first trial and was one of the exhibits that could not be found.

The appellants argued again that no documentary evidence was produced to show that the vehicle which the appellant sold in Mongu was indeed the one that had been driven by the deceased. They pointed out also that the registration document for the vehicle was not produced either. Finally, they pointed out that PW2 only identified the motor vehicle at the court but did not go on to identify it by its chassis number.

The prosecution have not specifically addressed this argument. However, the evidence in this case was very clear that PW2 identified the motor vehicle when it was in Mumbwa. And this is the motor vehicle whose possession the 2nd appellant was not denying. Therefore, by that evidence, the prosecution had shown that the vehicle that was in the 2nd appellant's possession was the one which the deceased used to drive.

The appellants then challenged the deceased's mother's (PW1) identification of the body as that of her son. They challenged her

statement that the body was damaged but the face was intact, and argued that it was not possible that while the body was decomposed the face had remained intact. We must dismiss this argument immediately. First, it is a matter for scientific evidence as to how a body decomposes. There was no evidence on that issue, so it is incompetent for the appellants to make arguments on it. Secondly, a parent has profound knowledge of their child. They are able to identify their children even where others cannot. In this case, PW1 was better placed than anyone else to recognize her son, even if the body was partially decomposed, as she stated. There was no basis to fault her recognition of her son.

Finally, the appellants argued that the prosecution had failed to prove that their possession of the motor vehicle also linked them to the death of the deceased. Citing the case of **Mwewa Murono v The People⁽¹⁾**, they argued that the prosecution, who bore the burden of proving every element of the offence, had therefore failed to discharge that burden.

The prosecution argued that the appellants were linked to the killing of the deceased by their possession of the motor vehicle that the deceased used to drive. They pointed out that, going by the fact

that the deceased's body was tied with wires and twine, it was clear that he was killed in order that the motor vehicle could be taken away from him. They pointed out that, barely seventy two hours, or three days, after the disappearance of the deceased, the appellants were in possession of the vehicle and selling it in Mongu. They have cited the case of **George Nswana v The People⁽²⁾** where we explained that an inference of guilt based on recent possession, where no explanation is offered which might be true, rests on the absence of any reasonable likelihood that the goods might have changed hands.

The prosecution further pointed out that there were odd coincidences which pointed to the fact that the appellants were not in innocent possession of the motor vehicle. The prosecution argued that it was strange for the 2nd appellant who claimed to have bought an already registered motor vehicle to have sold it without number plates, claiming that the registration process was still on-going. The prosecution wondered why a vehicle that was already registered and had a registration number would require re-registration.

Citing the case of **Martin Mupeta and another v The People⁽³⁾**, where we said that a period of three months in the case of

a motor vehicle was sufficiently recent for the presumption to operate that the one in possession must have been the one who stole it, the prosecution argued that in this case the period was only three days, thereby raising the only inference that the appellants are the ones who killed the deceased and robbed him of the motor vehicle.

We totally agree with the arguments by the prosecution. The fact that the '*Jembe*' phone was traced back to the 1st appellant through his relatives rules out the possibility that the motor vehicle could have first passed through a third party (such as the said Godfrey Mfune) after the disappearance of the deceased before it came into the possession of the appellants: we do not see why such party would have given the '*Jembe*' phone to the appellants, in addition to selling them the vehicle. Further, there was the fact that the vehicle was in the possession of the appellants after such a short period; and also the suspicious manner in which it was sold (which strongly suggest that they were not in innocent possession of the vehicle); all these pointed to one inference: that it is the appellants who robbed the deceased of the motor vehicle and killed

him. The trial judge therefore properly convicted the appellants. We find no merit in the appeal. We dismiss it.

E. N. C. Muyovwe
SUPREME COURT JUDGE

E. M. Hamaundu
SUPREME COURT JUDGE

J. Chinyama
SUPREME COURT JUDGE