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IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

APPEAL NO. 84, 85, 86/2021

BETWEEN:

DENNIS KANYEPA
CHARLES SIPESHA
PRESTON KANANGA

AND

THE PEOPLE



Coram: Makungu, Sichinga and Muzenga, JJJA

On the 14th February, 2022 and 25th day of March, 2022

For the Appellants: Mr. M. Kapukutula - Legal Aid board

For the Respondent: Ms. C. Soko Deputy Chief State Advocate -
National Prosecution Authority

JUDGMENT

Makungu JA delivered the Judgment of the Court

CASES REFERRED TO:

1. *David Zulu v The People* (1977) ZR 151
2. *Machobane v The People* (1972) ZR 101
3. *Donald Fumbelo v The People* SCZ Appeal No. 476 of 2013
4. *Joe Mulenga and others v The People*
5. *Haonga v The People* (1976) ZR
6. *Dorothy Mutale and Another v The People* SCZ No. 51 (1997)
7. *Ernest Yoombwe v The People* SCZ Selected Judgment No.15 of 2019

LEGISLATION REFERRED TO:

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

1.0 INTRODUCTION

1.1 At the outset we must state that the 1st appellant is the only appellant herein as we were informed by his Counsel Mr. Kapukutula that the 2nd and 3rd appellant were cited in error. That the 2nd appellant was detained during the president's pleasure as he was a juvenile at the time the offence was committed and is unwilling to appeal. The third appellant was acquitted and inevitably will not appeal.

1.2 The appellant was tried and convicted of the murder of Wisdom Chitengi contrary to **section 200** of the **Penal Code Chapter 87** of the **Laws of Zambia** and sentenced to death by E. Pengele J.

1.3 This appeal is against conviction and sentence.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The key evidence against the appellant came from PW1, PW2, PW4 and PW7. PW1, Gift Mukimwa testified that on 15th October, 2018, in Kasempa District he was sent to Fikonka Bar

to buy cigarettes for his uncle. He found the appellant with accused No. 2 who is cited herein as 2nd appellant. Wisdom Chitengi (the deceased) sat with a lit candle on the veranda of the bar. As he was leaving, he saw the appellant grab the candle from the deceased and give it to A2. When the deceased asked why they had done so and pleaded with them to hand it back the appellant slapped him causing blood to come out of his nose. The duo then, forcefully removed the deceased from the veranda and took him across Kasempa Road to a place near City Mall Bar where A3, the one cited in error as 3rd appellant joined them.

2.2 PW2, Lisa Mbelenga, the bar lady at Fikonka Bar testified that around 21:00 hours on the material day the appellant and, one Patrick Tumbama started fighting at the bar. Shortly thereafter the appellant and Patrick reconciled. The deceased entered the bar and sat near a speaker without buying beer. When it was time to close the bar at around 22:00 hours, she requested the door bouncers; the appellant and A2 to remove the deceased from the bar.

2.3 Patrick Tumbama got the deceased and took him to the veranda where he started slapping and kicking him with A1 and A2. At the time that PW2 knocked off, she left Patrick, A1, A2, Gift, PW1, Bobo and Mbuyu at the bar.

2.4 The following morning, she learnt of the death of the deceased. She went to the bar where she noticed blood stains, a shoe and some bricks on the veranda. She maintained that the appellant and A2 were the ones she saw slapping and kicking the deceased and that A3 was just standing. In cross-examination, PW2 admitted that she was detained by the police for 3 days as a suspect.

2.5 PW4, Enock Simunyola, the owner of Fikonka Bar, testified that on 16th October, 2018, around 06:00, he met police officers who requested him to take them to his bar. At the bar, he observed some blood drops on the veranda and a full and half burnt brick. On request by the police, he handed his door bouncers the appellant and A2 to them.

2.6 PW7, Detective Constable Kalizya Nyachiu investigated the matter. He was among the police officers who visited the crime scene located behind City Mall Bar.

He observed multiple injuries on the body of the deceased especially the face, and that blood was still oozing from the mouth and the nose. PW7 recovered three maroon buttons, a broken bench which was on top of the deceased's body. He observed that the deceased had been dragged from Fikonka bar, along Kasempa Road where he recovered the right black shoe. When he visited the bar, PW7 observed some blood stains and burnt bricks which had blood on them on the veranda where he recovered the left black shoe.

- 2.7 According to the postmortem report, the deceased sustained "***multiple fractures of the lower and upper jaws; laceration of the lower lip and left cheek; a fractured cheek bone; ruptured small intestine, sigmoid mesentery and mesenteric bruising; and bruising and grazing on the back and abdomen***". The cause of death was "***severe head injury***".

- 2.8 PW7 stated that the appellant and A2 were apprehended within Kasempa while A3 was apprehended in Mumbwa. According to his investigations, the people who were seen beating the

deceased were the three accused persons and two others who were still at large.

2.9 PW7 denied detaining PW2 and PW3 saying, he kept them for their safety. When asked if he was aware that both PW1 and PW2 said that they never saw A3 participate in beating the deceased, he responded that he was not aware. However, he admitted arresting A3 based on the information he got from PW1 and PW2.

2.10 In his defence, the appellant testified that on 15th October, 2018, he reported for work at Fikonka Bar between 08:00hours and 09:00 hours and worked up to 19:00 hours. He denied seeing the deceased at the bar whom he claimed he did not even know. That before he left the bar, he was harassed by Patrick, a relative of the owner of the bar.

2.11 That he learnt of the death of the deceased the following day. He denied having beaten the deceased saying, PW1 and PW2 lied when they told the Court that they saw him slap the deceased. He said he did not know A3 he met A3 for the first time him at the remand prison. He explained that he once

differed with PW2 because she accused him of having informed PW4's wife that she was having an affair with PW4.

2.12 A2 testified that on 15th October, 2018, at around 18:00 hours, he went to Fikonka Bar to see the owner of the Bar. Whilst there, he witnessed Patrick beat up the appellant who Al picked up a pool stick and left the bar. Thereafter, he (A2) decided to go home. The following day, he went to Fikonka Bar where he learnt of the death of the deceased. Later that day, he was apprehended by PW4.

2.13 A2 said that PW2 lied when he said that he was on duty on the fateful night and maintained in cross-examination that he was not an employee of Fikonka Bar. He stated that the appellant also lied that he was his workmate at that Bar.

2.14 A3's evidence was that he told the trial court that on 15th October, 2018, he was in Kasempa buying maize at Chakalala Depot. He finished buying maize at around 19:00 hours and Stayed at the depot. On 23rd October, 2018, he took some maize to Mumbwa from where he was apprehended by police. He was taken to Kasempa Prison where he met his co-accused for the

first time. He denied having been at the crime scene at the material time.

2.15 In cross-examination, he stated that he knew PW1 as he once went to sell maize at the depot prior to that fateful night.

3.0 DECISION OF THE COURT BELOW

3.1 The learned Judge found that it was not in dispute that the deceased was murdered on the 15th of October, 2018. He also found that it was indisputable that the deceased was dragged from Fikonka bar across Kasempa Road up to a place behind City Mall Bar where his dead body was found with severe injuries and a bench on the chest.

3.2 According to the trial judge, none of the prosecution witnesses saw any of the accused persons actually murder the deceased person. The evidence of the prosecution was largely circumstantial. Guided by the case of **David Zulu v The People**, ⁽¹⁾ the lower court considered whether the circumstantial evidence was cogent enough to take the case out of the realm of conjecture and permit only an inference that the appellants were guilty as charged.

3.3 The lower court considered the relevant circumstantial evidence and found that PW1 went to Fikonka Bar where he found the appellant, A2, PW2 and the deceased. That PW2 saw the appellant grab a candle from the deceased and give it to A2. He saw the appellant slap the deceased to a point where blood started coming out of the deceased's nose. Then the appellant and A2 grabbed the deceased from the veranda of Fikonka Bar and took him across Kasemba Road to City Mall Bar. They were joined in beating the deceased by A3, Patrick Tumbama and Mbuyu.

3.4 The trial judge noted that the relevant circumstantial evidence from PW2 was that; when it was time to close the bar at around 22:00 hours, she requested the door bouncers, Patrick and the appellant, to lift the deceased and remove him from the bar. Patrick got the deceased, took him to the veranda and started slapping and kicking him. The appellant also joined in slapping the deceased. However, PW2 maintained that A3 did not participate in beating the deceased.

- 3.5 That for PW4, the relevant circumstantial evidence was that on 15th October, 2018, it was PW2, the appellant and A2 who were on duty at his bar.
- 3.6 The lower court found that the evidence of PW1 and PW2 placed all the appellants at the scene of crime at Fikonka bar.
- 3.7 The lower court observed that PW2 and PW4 were detained by the Police, and could be said to have had their own interests to serve. However, he found that PW4 was held by the Police for his own safety on account of the crowd of people that had gathered by the bar infuriated by the murder of the deceased. PW4 was released on the same day shortly after the mob had dispersed. That in any case, the evidence both from the prosecution and defence did not show that PW4 could have been a suspect witness.
- 3.8 The trial court found that, PW2 was initially considered as a suspect by the police. This was because in cross-examination,

she stated that she was detained for three days because the police suspected her of having participated in beating the deceased.

3.9 There being a danger that PW2 could have been a witness with her own interest to serve, the lower court, guided by the case of **Machobane v The People**⁽²⁾, considered whether there was any evidence to corroborate the evidence of PW2. Material aspects of the testimony of PW2 were found to have been corroborated by PW1 and PW4.

3.10 That the evidence that the appellant and A2 were employed as door bouncers at Fikonka Bar, was clearly corroborated by PW4. Similarly, the evidence that the appellant and A2 participated in slapping the deceased, was corroborated by that of PW1.

3.11 The lower court dismissed the claim by A2 that PW1 was also detained with him as an afterthought as it was only raised when A2 was giving his testimony and further that A2 did not instruct his counsel to cross-examine PW1 and PW7 on the issue. In so doing, the learned Judge relied on the case of **Donald Fumbelo v The People**⁽³⁾

3.12 The trial judge came to the conclusion that the appellant and A2 participated in slapping and beating the deceased and were thus guilty as they had formed a common intention to prosecute an unlawful purpose in terms of **section 22 of the Penal Code.**

3.13 As regards A3, the lower court found that the evidence showed that though PW2 testified that she saw A3 at the bar, she did not see him participate in the beating of the deceased. That although PW1 also testified that he saw A3 joining the group that dragged the deceased, it was not clear from his evidence what that joining entailed because PW1 did not categorically tell the court that A3 joined in dragging and beating the deceased.

3.14 Further, the learned judge found the fact that A3, did not run away from Kasempa after the death of the deceased, but remained there until 23rd October, 2018, when he finished buying maize, meant that the State had failed to prove the offence of murder against him to the required standard. Therefore A3 was found not guilty and acquitted.

4.0 GROUND OF APPEAL

4.1 There is only one ground of appeal which is that;

“The lower court erred in law and fact when it convicted the appellant when the prosecution evidence failed to prove the guilt of the appellants beyond reasonable doubt”

5.0 APPELLANTS’ ARGUMENTS

5.1 Learned counsel for the appellant Mr. Kapukutula relied on the written arguments filed on 15th February, 2022. A summary of the same is as follows:

The prosecution’s case was, based on circumstantial evidence in the case of **Joe Mulenga and others v The People⁽⁴⁾ CAZ Appeal 92-95 of 2018** the court stressed that;

“In offences perpetrated by mobs, the trial courts must convict suspects only on clear evidence identifying the specific role they played in the commission of offence.”

That in the case of **Haonga v The People⁽⁵⁾** it was held inter alia that;

“Where two or more persons are known to have been present at the scene of an offence and one of them must have committed it, but it is not known which

one, they must all be acquitted of the offence unless it is proved that they acted with a common design.”

Counsel contends that the offence may have been committed by a mob and the appellant has not been proved to have inflicted the fatal blow, hence he should be acquitted.

5.2 That the circumstantial evidence in this case raises multiple inferences especially that no one witnessed what transpired beyond Fikonke bar. Some of the inferences are:

1. That the appellant and others killed the deceased.
2. That the deceased was killed by robbers.
3. That the deceased fell.

5.3 counsel went on to cite and rely on the case of **Dorothy Mutale and Another v The People⁽⁶⁾ 1997 S.J. 51. (S.C.)** where it was held inter alia:

“Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one that is more favourable or less favourable to an accused if there is nothing to exclude that inference. Where there are lingering

doubts, the court is required to resolve such doubts in favour of the accused.”

5.3 Finally Mr. Kapukutula prayed that the appellant be acquitted and set out liberty on the ground that the prosecution failed to prove the case beyond reasonable doubt.

6.0 RESPONDENT’S ARGUMENTS

6.1 Learned counsel for the respondent Miss Soko did not file written argument. Instead she opted to make viva voce submission. She conceded that there is insufficient evidence on record to prove that the appellant and A2 inflicted the injuries that caused the death of the deceased. She started that bricks were found at the bar and a bench was found on top of the deceased who had been stripped naked. For this reason, she agreed with the lower court’s finding at page 25 of the judgment that, other people may have been involved in assaulting the deceased. She submitted further that, there was ample opportunity and time for others to rob the deceased and assault him with the bench and bricks/stones. It would

therefore be speculative to say that the injuries that the deceased suffered were inflicted by the appellant and A2.

- 6.1 Ms. Soko did not agree with the factual finding at page 27 of the judgment that the bench could have been used by the appellant and A2 because it was not based on any evidence on record, as such, it is a perverse finding.
- 6.2 However, she submitted that the appellant was involved in assaulting the deceased and dragging him on the ground across the road and therefore he should be found guilty of assault occasioning actual bodily harm.

7.0 DECISION OF THE COURT

- 7.1 We have carefully perused the record and considered the submissions made by counsel on both sides.
- 7.2 It is common ground that the case is based on circumstantial evidence. However, our view is that the case was based on both circumstantial evidence and direct evidence.
- 7.3 Both PW1 and PW2 actually saw the appellant and A2 who were employed as bouncers at Fikonke bar by PW4, assaulting the deceased and dragging him from the veranda of the bar, across

Kasempa road to City Mall Bar. PW2 even saw a person named Patrick Tumbana slapping and kicking the deceased at the same veranda later. The preceding evidence was direct evidence. Since there was no eye witness to the killing of the deceased, evidence of who killed him was indeed circumstantial.

7.4 It is clear from the evidence on record that the deceased was only found dead the following day behind City Mall bar. He was naked and it appears that his shoes were found in different places. The deceased's body was found with a bench on top and stones nearby. Bricks were found on the veranda with blood stains. Under the circumstances, we accept the submissions by the respondent's counsel that the lower court rightly found that there was a possibility that other people robbed the deceased of his clothes, assaulted him and left him dead behind the City Mall Bar.

7.5 It is unclear from the evidence, as to whether the bricks found on the veranda were used by the appellant and A2 to assault the deceased, because the only clear evidence is that they slapped and kicked him and dragged him on the ground.

7.6 We also accept the submission by the respondents advocate that the finding by the lower court that the appellant and his co-accused had used the bench to assault the deceased was not based on the evidence on record and therefore it was perverse. As a result, we hereby set aside this finding.

7.7 There was insufficient evidence that the appellant and his co-accused had a common design to murder the deceased. Mr. Kapukutula's submission that it was unclear as to who inflicted the fatal blow on the deceased holds water and it is upheld. His submission that the circumstantial evidence raises multiple inferences especially that there was no eye witness to what transpired after the deceased was dragged to the City Mall bar, is also valid. Therefore, the cases of **Joe Muleya and others v The People**, **Haonga v The People and Dorothy Mutale and Another v The People** apply. We hold that the lower court misdirected itself by not considering that more than one inference could be drawn from the evidence on record and resolving the doubt in favour of the appellant by choosing to make a holding on the basis of the inference which was more

favourable to him which is that, other people possibly killed the deceased.

- 7.8 Applying the case of **David Zulu v The people**⁽¹⁾, we find and hold that the circumstantial evidence was not cogent enough to take the case out of the realm of conjecture so as to permit only an inference that the appellant was guilty as charged.
- 7.9 We take the view that the trial court drew wrong inferences from the circumstantial evidence at its disposal and therefore the conviction was not safe.
- 7.10 Coming to the suggestion by the respondent that the appellant should be convicted of the offence of assault occasioning actual bodily harm instead of murder, our position is that this is untenable at law in the circumstances of this case. The deceased in this matter died as a result of the injuries inflicted on him. We have already found that he could have been assaulted by other people who could have inflicted the fatal injuries. We cannot thus find the appellant guilty of the minor offence of assault occasioning actual bodily harm.

7.11 There is however, evidence that the appellant assaulted the deceased. On the basis of this evidence, we find the appellant guilty of common assault contrary to **Section 247 of the Penal Code**, following the case of **Ernest Yoombwe v The People.**⁽⁶⁾ We impose a sentence of one year imprisonment with hard labour which is the maximum for this offence with effect from the date of his arrest. This means he has effectively served the sentence.

8.0 CONCLUSION

8.1 In summary, the appeal succeeds to the extent of the decision above. The appellant is acquitted of murder and the death sentence is quashed.

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C. K. Makungu
COURT OF APPEAL JUDGE

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

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K. Muzenga
COURT OF APPEAL JUDGE