

**IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 03,04/2021**  
**HOLDEN AT KABWE**  
*(Criminal Jurisdiction)*

BETWEEN:

**KAFULO MUSHOSHO**  
**KAPWELESI SHAMWIYA**

**and**

**THE PEOPLE**

**1<sup>ST</sup> APPELLANT**  
**2<sup>ND</sup> APPELLANT**

**RESPONDENT**

**Coram: Hamaundu, Malila and Kaoma, JJS**

On 14<sup>th</sup> April, 2021 and 23<sup>rd</sup> April, 2021

For the Appellant : Mrs L. Z. Musonda, Legal Aid Counsel

For the State : Mrs F. L. Shawa - Siyuni, Director of Public  
Prosecutions

---

**JUDGMENT**

---

**HAMAUNDU, JS**, delivered the judgment of the Court

Cases referred to:

1. **Nyambe v The People (1973) ZR 228**
2. **Joe Banda v The People, Appeal No. 183 of 2013**
3. **James Mwango Phiri v The People, Appeal No. 171 of 2015.**

This appeal is against conviction for the offence of murder, and has proceeded only as against the 2<sup>nd</sup> appellant. When we heard the appeal on 14<sup>th</sup> April, 2021, documents were availed to us which proved that the 1<sup>st</sup> appellant died whilst in prison on 1<sup>st</sup> October, 2019. Consequently, his appeal has abated.

The appellants were charged before the High Court, sitting at Mongu (presided by Mung'omba, J, as she then was), with the offence of murder under our Penal Code. They were alleged to have murdered a man named Mulawo Makalicha. The evidence before the trial court was that the two appellants and the deceased, all hailing from Namatanda village in the Shangombo district of Western Province, attended a ceremony in the neighbouring village of Mukengami. It was the testimony of the witnesses that attended the ceremony that the 2<sup>nd</sup> appellant picked a quarrel with the deceased, whom he accused of being a wizard. During that confrontation, the 2<sup>nd</sup> appellant was seen kicking a stool, or chair, on which the deceased had been sitting prior to the confrontation. The testimony went on to state that, when the deceased left the ceremony for his village, the two appellants followed in the same direction, not long thereafter.

It was not in dispute that, the following day, the body of the deceased was found in the plains, along the route to his village. It

had multiple injuries to the head, and these were confirmed by medical examination to be the cause of the deceased's death. The evidence observed at the scene was only that which tended to incriminate the 1<sup>st</sup> appellant alone: the evidence was a shoe print on the sand. On the sole of the shoe were written the words "*bad boys*", and these were cast on the sand. The 1<sup>st</sup> appellant was known to own such shoes, and was found wearing them when he was apprehended.

As for the 2<sup>nd</sup> appellant, the really damning evidence came from his uncle, who told the court that, on the same night of the ceremony, the 2<sup>nd</sup> appellant came to his hut around 22.00 hours and told him that he (the 2<sup>nd</sup> appellant) and the 1<sup>st</sup> appellant had killed the deceased. The appellant went on to tell his uncle that he was intending to flee from the village.

In his defence, the 2<sup>nd</sup> appellant denied having quarreled with the deceased at the ceremony. He denied killing him either. As for the confession, he denied ever saying the words attributed to him. When asked why his uncle could make such a grave allegation against him, he replied that his uncle was capable of doing so because he had been coveting his (the 2<sup>nd</sup> appellant's) wife for some time.

The trial judge did not accept that PW3, the 2<sup>nd</sup> appellant's uncle, had any motive to falsely implicate the 2<sup>nd</sup> appellant. As a



result, she dismissed the 2<sup>nd</sup> appellant's assertion as a mere afterthought. According to the judge, this was because the allegation was not raised when PW3 gave his testimony. In the judge's view, she was therefore deprived of the opportunity to see the reaction of PW3 to that allegation and objectively assess the veracity of the 2<sup>nd</sup> appellant's allegation.

The judge then found that the totality of the evidence was overwhelming against both appellants. She convicted them and condemned them to the ultimate penalty- death.

The 2<sup>nd</sup> appellant appeals on two grounds. The first is that the circumstantial evidence in this case did not reach the degree of cogency that is sufficient to secure a conviction. The second ground attacks the trial court's rejection of the reason that the appellant gave as to why his uncle implicated him in the case. It is the second ground to which we wish to pay attention, because, in our view, the confession is the strongest piece of evidence against the 2<sup>nd</sup> appellant.

On this ground, Mrs Lukwesa, for the appellant, argued that it was necessary for the 2<sup>nd</sup> appellant to give an explanation why he thought PW3 would testify against him, and that the appropriate time for him to do so was during his defence. According to counsel it was, therefore, wrong for the judge to brand the assertion as an

afterthought merely on the ground that the 2<sup>nd</sup> appellant only raised it for the first time during his defence. Counsel cited the case of **Joe Banda v The People**<sup>(2)</sup> in support of that argument.

The learned Director of Public Prosecutions, in response, asked the question: if an accused person does not inquire into the deposition of a prosecution witness, how else would the trial court test the veracity or the credibility of that witness on issues which the accused wishes to rely on in his defence? She submitted that an accused person ought to build his defence by questioning the prosecution witnesses, otherwise his defence will be considered an afterthought. In support of that proposition, she cited the case of **James Mwango Phiri v The People**<sup>(3)</sup>.

We must point out that the confession in this case was not to a person in authority who would be required by the judge's rules to administer a warn and caution to the appellant. Instead, the appellant gave an unsolicited confession to his uncle, who was not a person in authority. So that confession was admissible in evidence and the only issue that was before the trial judge was one of fact to be resolved on credibility of the witnesses as to whether the appellant made the confession or not.

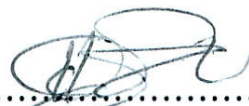


The appellant's uncle (PW3) told the court that the 2<sup>nd</sup> appellant confessed to him about the killing. The 2<sup>nd</sup> appellant, on the other hand, told the court that he did not confess at all. In addition, he said that PW3 had motive to falsely implicate him because he (PW3) coveted his (2<sup>nd</sup> appellant's) wife. So, the question before the trial judge was simply that of who to believe between the two; in other words the judge was called upon to decide whose testimony between that of PW3 and that of the 2<sup>nd</sup> appellant was more credible— and should be believed. In the end, the trial judge preferred the testimony of PW3 as being the more credible of the two on the ground that the 2<sup>nd</sup> appellant's assertion was an afterthought.

We have no reason to fault the judge for that conclusion. As we have said, the confession was the most damaging of the evidence against the 2<sup>nd</sup> appellant; and, if indeed PW3 was falsely implicating him on the ground asserted by the 2<sup>nd</sup> appellant, then the main focus of the 2<sup>nd</sup> appellant's defence should have been to this aspect of the evidence. Yet, when PW3 was on the stand, the 2<sup>nd</sup> appellant's assertion was not put to the witness so that the court could see his reaction. As if that was not enough, the record shows that the 2<sup>nd</sup> appellant appears not to have intended to traverse the testimony about the confession: He testified only on the circumstantial

evidence, and even told the court that that was all that he had in his defence. It was only when his advocate prompted him about the confession that he responded that he did not confess to his uncle. He was then asked why he thought his uncle would falsely implicate him, to which he replied by making that assertion. Clearly, that was an assertion made on the spur of the moment. The trial judge was therefore on firm ground when she rejected it as not being true.

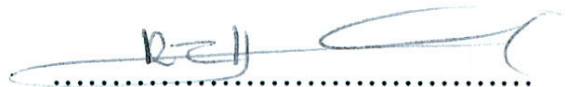
The overall position therefore is that the confession and other pieces of circumstantial evidence, when put together, amounted to overwhelming evidence which pointed to the fact that the 2<sup>nd</sup> appellant killed the deceased. Consequently, a discussion of the first ground of appeal is unnecessary. We, therefore, find no merit in this appeal and we dismiss it.



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



.....  
M. Malila  
**SUPREME COURT JUDGE**



.....  
R. M. C. Kaoma  
**SUPREME COURT JUDGE**