

HAPPY MBEWE v THE PEOPLE (1983) Z.R. 59 (H.C.)

HIGH  
SAKALA,  
14TH  
(HPA/39/83)

J.

JULY,

1983

COURT

Flynote

Evidence - Witnesses - Witness present in court throughout proceedings - Admissibility of testimony.

Evidence - Witnesses - Witness present in court throughout proceedings - Weight of testimony.

Evidence - Witnesses - Witness present in court throughout proceedings - Effect of excluding testimony.

Headnote

The appellant was charged with inflicting grievous bodily harm. At the close of the prosecution case, he, was put on his defence. He called one witness who had been present in court throughout the trial. In the interests of justice, the court disallowed his testimony and convicted the appellant, sentencing him to fifteen months imprisonment with hard labour. He appealed against both conviction and sentence.

**Held:**

- (i) There is no rule of law that witnesses must remain outside until called to give evidence; and indeed if a judge in his discretion, so rules, he cannot refuse to hear the testimony of a witness who has remained in court throughout.
- (ii) The evidence is admissible, but the court in considering the evidence at the end of the trial, will have to determine what weight to attach to that evidence.
- (iii) It is a serious misdirection, prejudicial to the appellant and fatal to the prosecution case to disallow the witnesses evidence.

**Cases cited:**

(1) Moore Lambeth County Court Registrar [1969] 1 W.L.R. 141.

For the appellant: S. Tembo and Co.

For the respondent: N. Sivakumaran, State Advocate.

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Judgment

**SAKALA, J.:**

The appellant was convicted of grievous harm by the Subordinate Court of the Lundazi District. He was sentenced to 15 months imprisonment with hard labour. He has appealed to this court against both conviction and sentence.

The circumstances leading to this case are that on 14th August, 1982, the complainant, in a group of

others as well as the appellant with his group were at a beer party. At the end of the beer drinking session, the complainant left the scene with his friends. As they proceeded going to their homes the appellant also on his way home followed, his friends too. According to the case for the prosecution, when the appellant was caught up with the group of the complainant, he began uttering insults generally.

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As a result one of the complainant's friends rebuked the appellant, who later got annoyed. Thereafter, a fight between the complainant and one of the colleagues of the appellant erupted. It appears from evidence that in the end, this fight turned into a free for all resulting in the complainant sustaining the injuries complained of.

The case for the prosecution was that, the fight was started by the appellant. According to the evidence of the arresting officer in cross-examination, the appellant reported himself to the police station carrying a knife which he said belonged to the complainant. The prosecution witnesses at the scene, the friends of the complainant, all denied in cross-examination of seeing the complainant with a knife.

At the close of the prosecution case, the appellant was put on his defence. After his rights were explained, he elected to give unsworn statement but told the court that he had one witness who had been in court throughout the trial. The appellant's intended witness admitted to having been in court throughout the trial. The court then made the following order:

"Accused witness who has been listening to all that was happening, in the interest of justice will not give his evidence."

In my opinion, this was a serious misdirection on the part of the learned trial magistrate. In practice, witnesses remain out of court until called to give their evidence, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be examined after him. In *Moore v Registrar of Lambeth County, Court (1)* at page 142 Edmund Davies, L.J. said:

"No rule of law requires that in a trial, the witnesses to be called by one side must all remain out of court until their turn to give testimony arises. This is purely a matter within the discretion of the court. . . Indeed, If the court rules that witnesses should be out of court and a witness nevertheless remains in court . . . the judge has no right to refuse to hear (his) evidence."

I entirely agree with this statement but I would add further that where a situation arises in which a witness to be examined heard the evidence of the other witnesses, his evidence is still admissible but the court, in considering in evidence at the end of the trial will have to determine as to what weight to attach to that evidence.

Turning to the instant case, a perusal of the record reveals that the appellant's position was that he acted in self-defence. In his unsworn statement, he said:

"I started off alone. I caught up with the complainant with his friends. As they talked to me James Phiri insulted my mother. The complainant hit me on my left cheek and I fell down. Then Peter Mumba came. He asked why I was being attacked. This Peter Mumba is the same man who has been disallowed to give evidence. The complainant also attacked him. After attacking Mumba he came to beat me again and I fell down.

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The complainant then produced a knife. I held him by the hand which had the knife, twisted it and pulled him towards me. I tripped and hit him on the mouth and he fell down. I then snatched the knife from him."

It is quite clear that the issue in the matter was one of credibility. The learned trial magistrate believed the prosecution story. Yet, it is also the prosecution case that the appellant who reported himself to the police brought with him a knife said to belong to the complainant. Peter Mumba, the appellant's intended witness was refused to give evidence by the court on the ground that he had heard the prosecution witnesses. This as I have said was a serious misdirection which in my view prejudiced the case for the appellant and fatal to the prosecution case. The issue having been one of credibility, I cannot say that had the appellant's witness given evidence, the learned trial magistrate would still have come to the same conclusion. In these circumstances, I find it unsafe to allow this conviction to stand. I thus quash the conviction and set aside the sentence. The appellant stands acquitted.

Appeal allowed

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