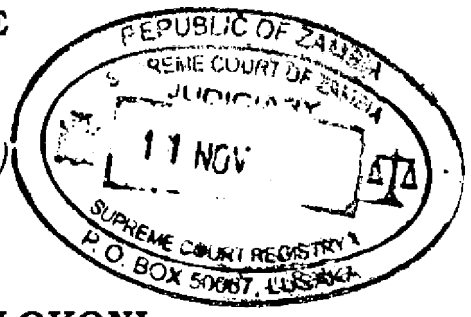
IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE

SCZ APPEAL NO. 176/2020



(Criminal Jurisdiction)

BETWEEN:

HAGGAI KUNDA KALOKONI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS.
On 3rd November, 2020 and 11th November, 2020

For the Appellant: *Mr. P. Chavula, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *Mr. S. Simwaka, Senior State Advocate, National Prosecutions Authority.*

J U D G M E N T

Chinyama, **JS**, delivered the Judgment of the Court.

Cases referred to:

1. **Kambarage Mpundu Kaunda v The People (1990-1992) ZR 215**
2. **George Musupi v The People (1978) ZR 271**
3. **Yokoniya Mwale v The People, SCZ Appeal No. 285 of 2014**
4. **Wilson Mwenya v The people, SCZ Judgment No. 5 of 1990**
5. **Bwanausi v The People (1976) ZR 103**
6. **Dorothy Mutale and Richard Phiri v The People (1997) SJ 1**
7. **Andrew Mwenya v The People, Appeal No. 640 of 2013**

8. **Jackson Kayuni and Muvumbi Muyoba v The People, Appeal Nos. 251 and 252 of 2011**
9. **George Lipepo and Others v The People, SCZ Judgment No. 20 of 2014**
10. **David Zulu v The People (1977) ZR 151**

The appellant was convicted of the murder of seven persons and the attempted murder of five other persons by the High Court (Lisimba J, as he then was, presiding) at Ndola. All twelve were family members. He was sentenced to death on each one of the seven murder counts and life imprisonment on each one of the five attempted murder counts. The appeal is against conviction.

The case arose out of an incident in Ndola at the Culture Village in Masala where a house made out of planks, plastics and grass was set on fire around 23:00 hours in the night on 8th August, 2009. All seven occupants in one room were burnt to death while five occupants in another room escaped with burns to parts of their bodies. The house belonged to Judith Mulimba, one of the seven that died. The rest of the victims that died were Eda Malambo, Mavis Malambo, Mark Malambo, Gloria Malambo, Isata Nkandu and Emmanuel Sichilongo. The five that escaped with burns were Grace Changwe, Dorcas Musonda, Kelvin Musonda, Blessford Kunda and Gift Musonda.

As to how the house could have been set on fire, the evidence of PW1, Grace Changwe and her sister PW2, Dorcas Musonda was that the appellant who, according to PW1, was her former husband, had visited them during the day around 11:00 hours and picked up his two children Blessford Kunda and Isata Nkandu and returned them afterwards after buying them fritters. He went away. He returned later and remonstrated with PW1 for a reconciliation which PW1 spurned. The appellant asked for a container in which to buy some beer. He was given and he bought chibuku beer which he sat drinking. In the night the appellant was told to go away as it was late. He resisted and then demanded that he be given his son Blessford Kunda so that he could go with him. PW1 told him that he could pick up the boy in the morning. In response the appellant began to cry. According to PW1, the appellant then said, *"have you seen the way I have cried, you and your family are going to cry more than I have cried"*. PW2 stated that she heard the appellant say that they had made him cry, that it was nothing compared to what he was going to do. When PW1 asked the appellant what he meant, he responded that he knew himself. PW1 retorted that he would be held responsible for

whatever would happen to her and her family. The appellant then left and the family went to sleep.

In the night while the family was sleeping PW1 and PW2 noticed that the house was on fire. According to PW1 before going to sleep the candles which they had been using for light had all been doused. Both witnesses saw fire coming from the other room where their elder sister Judith Mulimba and others were sleeping. PW1, PW2, Blessing and the two others ran outside. While there they noticed that the seven people in the other room had not come out. They were later found to have been burnt to death. It was not known how the fire had started and the appellant was not seen at the scene. PW1, PW2 and the others were burnt on parts of their bodies. PW2 told the Court that she hated the appellant for what he had done.

There was evidence from PW3, Vainess Kunda, an aunt to the appellant that the appellant had been living with her since he came from the village in Serenje. He used to sleep in the kitchen. On the fateful day he had left home around 11:00 hours and she did not see him again until she was told that he was detained at Kafubu Police

Post. She saw him on 10th August, 2009 in police custody at Masala Police Post.

Another witness, PW4, Movious Sinkala, a police officer based at Masala Police Station who was the arresting officer stated that he and other officers rushed to the Culture Village after receiving an anonymous call about the fire. On arrival they found the house completely burnt and the bodies of the seven deceased charred. He also saw the five that escaped the fire. He stated that he arrested the appellant because PW1 named him as the prime suspect because of threats that he was alleged to have uttered before leaving earlier that night. PW3 had also told him that the appellant did not return home that night. PW1 and PW2, however, told the officer that they did not like the appellant. The officer stated that under warn and caution, the appellant denied setting the house on fire.

The appellant's defence was that he was still married to PW1 though they lived separately because of lack of accommodation. He stated that on 4th August, 2009 his aunt, PW3, had chased him from her home because he used to go home late and she did not want trouble with his father. Because of this he made a decision to go back

to the village and on 7th August, 2009 he moved from PW3's house together with his property which he took to Kaloko compound. He testified that on the material day, he did go to his wife's home and left around 19:00 hours after drinking his chibuku beer which he shared with her relatives. Before leaving, he informed his wife and relatives that he would come back in the morning to collect his son, Blessford. He then went to Bonano where he met his friend, Everisto Mulenga whom he escorted to see a girlfriend in Kaloko and he spent the night there. The next day he learnt about the burning of the house at the Culture Village and that he was being suspected as the perpetrator. He went to Kafubu Police Post to confirm the incident and he was apprehended while there. He denied having set the house on fire or that he threatened that something would happen to his wife and her family. He suspected that his wife and PW2 had concocted the story against him because they were moving with other men whom they wanted to marry if he got imprisoned.

The learned trial judge found as a fact that the appellant was the last person seen at the scene of crime hours before the burning of the house which the learned judge accepted on the basis that PW2

had corroborated PW1; that he made threats to wipe out the family of his estranged wife and before that he wept; that there was no explanation why he wept other than that he had a guilty intention; that the appellant wanted to take away his son as an attempt to save the boy from what he was intending to do; that the appellant was the only person who had a reason to commit the offence because, having divorced his wife, he still wanted to reconcile but the wife was not ready, hence the revenge; that after leaving PW1's house he did not go to his aunt's home in Kabushi but ended up in Kaloko; that it is not true that the aunt chased him from her house; that the appellant had lied about not knowing his wife's home when it is clear that he knew where she lived.

The learned judge concluded, based on inference that the appellant was the one who set the house on fire in which the seven people were burnt to death and the five others escaped with various burn wounds to their bodies. He accordingly found malice aforethought to have been established in respect of the murder charge. The learned judge found no defence available to justify the

reduction of the charges of murder to lesser ones. He also found no extenuating circumstances.

In respect of the attempted murder charges, the learned judge found the setting of the house on fire as constituting an overt act manifesting the appellant's intention to kill the five other persons because had they not escaped, they could also have been burnt to death.

The learned judge accordingly found the offences of murder and Attempted murder to have been proved. Sentences of death and life Imprisonment respectively were passed.

The appellant is dissatisfied with the conviction and has appealed to this court on the following two grounds-

1. The learned trial judge erred and misdirected himself both in law and fact when he convicted the appellant on the uncorroborated evidence of PW1 and PW2 who were witnesses with a possible motive of their own to serve.
2. The learned trial judge erred and misdirected himself both in law and fact when he drew an inference of guilt from the

circumstantial evidence which permitted other inferences than that of guilt.

Heads of argument in support of the two grounds of appeal were filed. The substance of Mr Chavula's argument in the first ground is that PW1 and PW2, who gave evidence which the court relied on that the appellant had threatened to do something bad to their family before leaving earlier that fateful night, were related to the deceased persons and the other victims that survived. PW2 also told PW4 that she hated the appellant. It was submitted, therefore that the two witnesses had an interest of their own to serve. This presented a danger of false implication and the learned trial judge ought to have shown that he was alive to the danger and must have excluded it before relying on the witnesses' evidence. The cases of **Kambarage Mpundu Kaunda v The People**[1], **George Musupi v The People**[2] and **Yokoniya Mwale v The People**[3], were cited to shore up the submission.

It was further contended that the danger of false implication not having been excluded, the learned trial judge ought to have looked for corroboration supporting the evidence of PW1 and PW2. It was

submitted particularly, that the evidence of PW1 and PW2 could not corroborate each other because they did not give independent evidence of separate incidents regarding the threatened words allegedly uttered by the appellant so that the danger of a jointly fabricated story was not ruled out. The case of **Wilson Mwenya v The People**[4] was cited in support. The issue, according to Counsel, was whether the prosecution had adduced any other evidence to corroborate or support the evidence of PW1 and PW2 in some material particular since the dangers of a jointly fabricated story were not excluded. It was submitted that there was no other independent evidence on the record to support the witnesses. We were urged to allow the appeal on this ground and quash the conviction.

Coming to the second ground of appeal, the argument centered on the fact that there was no witness who saw the appellant set the house on fire. It was pointed out that there was no evidence on record that the appellant had threatened to wipe out PW1's family; that unlike PW1 and PW2's room in which the two witnesses said they put out the candles, there was no evidence that the candles in the room occupied by the deceased were also put out. It was submitted that

in these circumstances there was more than one inference how the fire could have started. The fire could have started from outside accidentally or from inside by a candle that might not have been put out. The cases of **Bwanausi v The People**[5] and **Dorothy Mutale and Richard Phiri v The People**[6] were cited with regard to the drawing of inferences. We were urged to allow the appeal and quash the conviction.

Mr. Simwaka's response to the arguments in the first ground of appeal was that the mere relationship, of PW1 and PW2 to the deceased persons did not automatically create an interest to serve on the part of the two witnesses. Citing the case of **Andrew Mwenya v The People**[7], it was argued that there were no circumstances on the evidence which could have stimulated PW1 and PW2 to have a motive to give false evidence against the appellant. It was pointed out that the two witnesses had hosted the appellant on the fateful day and PW1 even told the appellant when he requested, that he was free to collect his son the following day. This did not show a bad relationship. As for PW2's expression of hatred for the appellant it was contended that this was after the fact. It was contended that

unlike in the case of **Jackson Kayuni and Muvumbi Muyoba v The People**[8] cited by Mr. Chavula, where a witness said he wanted to see the people who killed his mother to be punished by imprisonment or hanging which showed bias on the part of the witness, in the present case PW2 did not express any such desire. That PW1 did not mention hating the appellant at any time. Therefore, that the evidence of the two witnesses was not tainted in any way. It was submitted that the learned trial judge was on firm ground when he convicted the appellant and we should dismiss the ground and uphold the appeal.

With regard to ground two, Mr. Simwaka contended that the learned trial judge did not err when he drew an inference of guilt as the circumstantial evidence on record permitted only an inference of guilt. It was submitted that the learned trial judge properly resolved the question of who started the fire which killed seven people and wounded five others. It was pointed out that when his attempt to reconcile with PW1 failed, the appellant cried and threatened that PW1's family would cry more. That when asked to explain why, he responded that he knew himself. It was submitted, therefore, that the appellant had a plan to make PW1's family cry and he actualised

it by setting their house on fire. It was submitted, further, that the learned trial judge found that the appellant was the only person who had a reason or motive to commit the offence which was justified by the appellant's expressed desire to revenge due to his failed reconciliation with PW1. It was pointed out that it was odd that about two hours after his threat, the house was burnt and the appellant and his property were not found at his aunt's house where he used to stay. These were odd coincidences that supported the allegation that he had committed the offence.

According to Mr. Simwaka, it was not possible that the fire could have started from inside the house because all the candles had been put out. It was argued to the effect that even without expert evidence as to what could have caused the fire, it was clear that the fire was not started from inside, that the circumstantial evidence points to the appellant as the perpetrator of the offence. It was submitted that the learned trial judge was on firm ground when he convicted the appellant notwithstanding the dereliction of duty, of not investigating the cause of the fire as we understood the submission. The case of **George Lipepo and Others v The People**[9], was cited in support. It

was reiterated in conclusion that the only inference capable of being drawn from the circumstantial evidence is that it is the appellant who caused the fire which killed the deceased and wounded the survivors. It was Mr. Simwaka's prayer that we dismiss the appeal and uphold the convictions and the sentences.

We are grateful to the respective Counsel for the parties for their eloquent submissions. Obviously, this was an emotional case bearing in mind the highly traumatic consequences which the fire brought about in its wake whichever way it was started.

We propose to deal with both grounds of appeal at once because we think that the issues involved are intertwined. The question at the end of the day is: how did the fire start that killed the seven deceased persons and wounded the five survivors. This is the question at the core of this case. The appellant's position is that the fire was not started by him; that we should not take account of the evidence of PW1 and PW2 regarding what he is alleged to have threatened just before he left the house where his estranged wife lived; that he did not say it. This is because the two witnesses are relatives to the deceased

persons and, we may add, that they were themselves victims of the fire. Thus they have an interest in seeing the appellant punished.

The foregoing position is countered by the State to the effect that the mere relationship of the two witnesses to the deceased does not create an interest to serve on their part. That in fact there is nothing to show that they could harbour such an interest. Further, that all the evidence, as found by the learned trial judge, points to the appellant setting the house on fire. He was spurned by his wife who refused to reconcile with him. This gave him a motive for revenge which he executed by setting the house on fire. He wanted to take away his son which the court saw as and the State believed was an attempt to save the boy from his sordid plans to burn the house and its occupants. He moved away from his aunt's place and was not seen there after the fire. He claimed that he had been chased from the house by the aunt but the aunt refuted it.

We have considered the contending positions taken by counsel. We agree with Mr Chavula that PW1 and PW2 are witnesses with possible interests of their own, being relatives to the deceased and

victims of the arson. In the case of **Kambarage Mpundu Kaunda[1],** cited by Mr Chavula, we said that-

> **"In our opinion, it is feasible for relatives or friends of a victim to have a possible bias against an accused person. We would agree with Mr. Ngenda that the prosecution eye witnesses in this case were friends or relatives of the deceased and, therefore, could well have had a possible bias against the appellant, and as they, and in particular PW11, Andrew Kaonga, were themselves the subject of the initial complaint by the appellant as having attacked him and his friends, there was a possible interest of their own to serve."**

PW1 and PW2 were related to the victims of the arson. They were also themselves victims of the arson. There can, therefore, be no doubt that they are witnesses with an interest of their own to serve. As to how to approach the evidence of such witnesses, we recently stated in the case of **Yokoniya Mwale v The People[3]** also cited by Mr Chavula that-

> **""A conviction will ... be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key is for the court to satisfy itself that there is no danger of false implication."**

In accepting the evidence of PW1 and PW2, the learned trial judge did not show in his judgment that he was alive to the danger of false implication. This was a misdirection. As has been pointed out PW1 and PW2 were related to the victims of the arson and were themselves victims. Further, according to PW4, the arresting officer, both witnesses told him that they hated the appellant, as we understand, for what they presumed he had done. Caution was, therefore, required when dealing with the evidence of the two witnesses. We note from the judgment, however, that the fact that the appellant made the threat was never an issue with PW1 who was cross examined on other matters. It was only an issue with PW2 who was asked why she had not mentioned the threat to the police in her pre-trial statement to them and she explained that she was in a state of confusion at the time. Therefore, even if we exclude the testimony of PW2, there is nothing which should have made the Court below disbelieve PW1. The fact that PW1 could have told PW4 that she hated the appellant for setting the house on fire does not take away from the fact that the appellant uttered the threat. It is clear to us that there is nothing in the evidence to show that PW1 had a motive to falsely implicate the appellant. We are satisfied that the appellant

did make the threatening statement alluded to by PW1. We, of course, do not agree with the learned trial judge's finding that the appellant threatened to wipe out PW1's family. This finding by the learned trial judge was an embellishment not supported by the evidence as argued by Mr Chavula. What the appellant was reported to have said is that they (PW1 and her family) would cry more than he had done. This could mean anything and brings us to the question whether the only inference that can be made from the evidence is that it is the appellant who set the house on fire.

An inference that an accused person committed an offence can be drawn in the absence of direct evidence if it is the only one that can properly be made from the evidence available. Where the evidence is such that it allows the drawing of more than one inference, one or more of which points to the innocence of the accused, then the favourable inference is to be adopted and the benefit of it given to the accused person. The foregoing is the essence of this Court's decisions in cases such as **David Zulu v The People**[10] and **Bwanausi v The People**[5] to which we were referred by Mr

Chavula. In the judgment in the Court below, it was recorded as follows at page J7 regarding the evidence of PW1:

> **"Approximately two hours after the accused had left, the witness saw fire coming from the room where her young sister and her children were sleeping. It was her testimony that on that particular day they were using candles but before they went to bed they put all the candles off."**

Mr. Chavula is of the view that this did not constitute evidence that the candles even in the other room where the seven slept were put out while Mr. Simwaka's position is that all the candles were put out meaning in both rooms. We are at pains to appreciate Mr Simwaka's argument for the simple reason that PW1 was not in the room where her elder sister Judith and the other six were sleeping to vouch for what happened there. It is very possible that there could have been a candle that was left flickering in the other room or was relit later. It is also possible as pointed out by Mr Chavula that the fire could have been started from the outside. We think that this was a case in which the State should have sought the services of fire experts to help determine how the fire could have started. It is possible that the fire could have been started from within the room or outside the room bearing in mind that the house was constructed of highly

was reiterated in conclusion that the only inference capable of being drawn from the circumstantial evidence is that it is the appellant who caused the fire which killed the deceased and wounded the survivors. It was Mr. Simwaka's prayer that we dismiss the appeal and uphold the convictions and the sentences.

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combustible materials comprising plastics, wood and grass. In the circumstances, the inference that the appellant came back and set the house on fire cannot be the only inference available. It does not, in our view matter that hours before the house got burnt the appellant had threatened that PW1 and her family would cry more than he had done. It would be daubing in conjecture to assume on that basis that the appellant set the house on fire when there is a real possibility that the fire could have started by other means. As we have said expert evidence would have greatly assisted in determining the cause of fire and the absence of this evidence which was at the State's disposal through the fire services authority in the area must react in favour of the appellant. As we pointed out, the law is that where there is more than one inference, the court adopts one which is most favourable to an accused. In this case the inference favourable to the appellant is that the fire may have started from another source other than the appellant setting the house of fire.

The result of the foregoing is that although there is no merit in the first ground of appeal the appeal has succeeded on the basis of the second ground which we uphold. We find the appellant not guilty

of the seven counts of murder and the five counts of attempted murder. We set aside the convictions and the sentences and set the appellant at liberty.

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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E.M. HAMAUNDU
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE