IN THE SUPREME COURT OF ZAMBIA **SCZ/159/161/2014**

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

JERICKS MUPETA	**1ST APPELLANT**
JOHN CHIBUYE	**2ND APPELLANT**
ROBERT NGOSA	**3RD APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

Coram: Wanki, Muyovwe and Malila, JJS

On 7th October 2014 and 7th June, 2017

For the Appellants: T. S. Ngulube of Messrs. F.B. Nanguzyambo & Associates and Mrs. C.K. Kabende, Senior Legal Aid Counsel

For the Respondent: Mr. B. Mpalo, Senior State Advocate

JUDGMENT

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *David Zulu v. The People (1977) ZR 151*
2. *Chipango and Others v. The People (1978) ZR 304*
3. *Kambarage Mpundu Kaunda v. The People (1990/ 1992) ZR 215*
4. *Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v. The People (1988-1989) ZR 163*
5. *Simon Choka v. the People (1978) ZR 243.*

6. *Yokonia Mwale v. The People,Appeal No. 285 of 2014*
7. *Kambenja v. The People, Appeal No. 22 of 2014*
8. *Guardic Kameya Kavwana v. The People, Appeal No. 84 of 20015*
9. *Muchabi v. The People (1973) ZR 193*
10. *Mwape v. The People (1976) ZR 160*
11. *Haonga and Others v. The People (1976) ZR 200*
12. *Mutambo & Others v. The People (1965) ZR 31*
13. *Bwalya v. The People (1975) ZR 125*
14. *Simutenda v. The People (1975) ZR 294*
15. *Nzala v. The People (1976) ZR 21*
16. *Lubinda v. The People (1973) ZR 57*
17. *Muwowo v. The People (1965) ZR 91*
18. *Lumangwe Wakilaba v. The People (1979) ZR 74*
19. *Wilfred Kashiba v. The People (1971) ZR 95*
20. *Mbewe v. The People (1976) ZR 317 at 319*
21. *Kasuba v. The People (1975) ZR 274*

Other authorities referred to:

1. *Section 21 (1) (a) – (c) of the Penal Code, chapter 87 of the laws of Zambia*
2. *Section 122 of the Juveniles Act, chapter 53 of the laws of Zambia*
3. *Section 200 and 22 of the Penal Code chapter 87 of the laws of Zambia*

We regret the delay in delivering this judgment.

When this appeal was heard, we sat with our learned brother Wanki JS. He has since retired. This judgment is, therefore, by majority.

The appellants were arraigned on a charge of murder and convicted by the Lusaka High Court, and were sentenced to death in February, 2013.

The brief facts before the trial Court were that the three appellants, on a date unknown, but between 30th May, 2009 and 31st May, 2009 at Mkushi, in the Mkushi District of the Central Province, murdered one Estone Ngosa at his house using a firearm stolen from a police camp. The deceased had previously worked with the three appellants at a farm before the trio were separated from employment.

After hearing evidence from ten (10) prosecution witnesses and from the three appellants on their own behalf, the learned trial Judge was satisfied that the prosecution had proved its case beyond reasonable doubt and found the appellants guilty as charged.

Dissatisfied with the Judgment of the High Court, the appellants now appeal to this Court, assailing the judgment on ostensibly eight grounds. These are set out in two documents filed on behalf of the appellants by Messrs. Nanguzyambo &Associates and the Legal Aid Board respectively. We shall hereafter refer to the grounds filed by Messrs. Nanguzyambo and Associates as the "initial grounds of appeal" and those by the Legal Aid Board as the "subsequent grounds of appeal."

The Notice of Appeal dated 16th May, 2013 framed the initial grounds of appeal as follows:

"1. **The trial Judge erred in law in convicting all the three convicts based on the uncorroborated testimony of a minor and that of unreliable witnesses.**

2. **The lower Court erred in law and in fact when it convicted all the three convicts because there was no direct evidence that the three convicts either worked on a common purpose or that they indeed committed the offence.**

3. **The lower Court misdirected itself when it failed to consider the alibi raised by the third appellant which was not challenged by the State that at the time of the murder he was not present.**

4. **The lower Court erred in law and in fact in admitting inadmissible evidence obtained against the 3rd convict after being beaten by the police as confirmed by PW1 and the duress during investigations.**

5. **The lower Court erred in law in relying on the evidence of the 1st convict to implicate his colleagues which evidence did not leave the realm of conjecture. PW4 admitted seeing convict number 3 at the funeral and that at that time the purported eye witness would have told the police that convict number 3 was involved.**

6. **Other grounds of appeal may be advanced upon full perusal of the case record."**

Needless to state that only five, and not six, grounds have been presented here; number six not being a ground of appeal in itself.

On 30th September, 2014, Legal Aid counsel filed in the subsequent grounds of appeal also seeking to impugn the lower Court's judgment as follows:

> **"GROUND ONE**
> **The learned trial Judge erred in law and fact when she convicted the appellants based on the alleged confession statements of the Appellants when it was not proved that the same were given freely and voluntarily.**
>
> **GROUND TWO**
> **The learned trial Judge misdirected herself in law and fact when she convicted the Appellants on uncorroborated evidence.**
>
> **GROUND THREE**
> **The learned trial Judge misdirected herself in law and fact when she convicted the appellants on circumstantial evidence when an inference of guilt was not the only reasonable inference which could be drawn from the facts."**

We think it well to state immediately that, as will become apparent, the evidence upon which the appellants were convicted, was largely circumstantial, and, therefore, that the issues implied in all the grounds of appeal, gyrate around the

trial Judges' treatment of the circumstantial evidence available before her.

Two sets of heads of argument in support of the two sets of grounds of appeal were filed. Messrs. Nanguzyambo and Associates filed in their heads of argument on 1st October, 2013, while the Legal Aid Board filed in theirs on 30th September, 2014. The Respondent's counsel filed in his heads of argument on 31st October, 2014. It is on these heads of argument that counsel for both parties relied.

It is apparent to us that the initial and subsequent grounds of appeal are in many respects not mutually exclusive. We discern in particular, that the arguments around ground one of the initial grounds of appeal should apply also, in large measure, to those anchoring ground two of the subsequent grounds of appeal. We also note that ground two of the initial grounds of appeal, is not dissimilar from ground three of the subsequent grounds of appeal, nor is ground four of the initial grounds of appeal any different from ground one of the subsequent grounds of appeal. For expediency then, rather than consider the initial grounds of appeal and the subsequent

grounds of appeal consecutively, we shall consider them together as follows:

1. ground one and five of the initial grounds of appeal will be dealt with together with ground two of the subsequent ground of appeal.

2. ground two of the initial grounds of appeal will be considered alongside ground three of the subsequent grounds of appeal;

3. ground three of the initial grounds of appeal will be dealt with as a stand-alone ground; and

4. ground four of the initial grounds of appeal will be treated together with ground one of the subsequent grounds of appeal.

In respect of the initial grounds of appeal, Mr. Ngulube, learned counsel for the appellants, indicated that all the grounds would be argued together, while the learned counsel for the respondent on the other hand, responded to the grounds as framed, severally. Doing the best we can in these circumstances, we shall consider Mr. Ngulube's topsy-turvy written arguments in support of the initial grounds of appeal, cluttered though they are, and those of Mrs. Kabende, learned

Senior Legal Aid counsel for the appellants, as they relate to the same ground and thereafter, the arguments in rebuttal made thereto by the learned counsel for the respondent.

The thrust of the argument in the first ground of the initial grounds of appeal is that the Judge *a quo* misdirected herself when she convicted the appellants on the basis of the uncorroborated testimony of a minor and that of unreliable witnesses. The essence of counsel's submission, as we understand it, is that given that PW1 was the wife of the deceased, her evidence needed to be corroborated. PW4 was only 14 years old, and was thus a minor whose evidence also needed to be corroborated. The evidence of the other witnesses which should have otherwise corroborated PW1's evidence, was itself given by an unreliable witness, and as such it ought to have been discounted.

To buttress the point of the unreliability of the other witness whose evidence could otherwise be corroborative of that of the minor, PW4, the learned counsel for the appellant referred us to what he considered as contradictions in the evidence of PW1. Counsel posited that PW1, contradicted

herself when she alleged that it was the white man who implicated the appellants and not herself, but later stated that she mentioned to the police that she suspected that the 3rd appellant could have killed the deceased because of their differences at work. Counsel pointed out that the same witness stated in cross examination that she did not see the assailants on the day of the shooting but also that she saw only one person at the time.

He also referred to the fact that PW4, whom the trial Judge found not to be a credible witness, had given information to PW9 which formed the basis of PW9's testimony before the Court. According to Mr. Ngulube, the learned trial Judge should have discounted the evidence of PW9. The learned counsel also argued that the omission in PW5's evidence to mention the number of people who went to the camp, made PW5's evidence unreliable. Counsel also alleged that PW5 contradicted himself when he said three men started demonstrating how they went to the police camp while at a different time the same witness claimed that the other two appellants were watching one appellant demonstrate. The learned counsel also argued that the evidence of PW6 never

revealed that he saw three people demonstrating and that there was, therefore, no basis for the trial Judge to hold that three people were demonstrating because no one saw them. According to counsel, PW6 did not even mention the 2nd appellant and the 3rd appellant in his testimony. Counsel also complained that none of the witnesses identified the 2nd and 3rd appellants and no identification parade was ever held. Counsel submitted that while PW9 relied on alleged confession statements in the warn and caution statements of the appellants, he never produced these statements despite the objection to such evidence.

The learned counsel for the appellants also argued that the first four witnesses, PW1, PW2, PW3 and PW4 were related to the deceased and were, therefore, witnesses with a possible interest of their own to serve and the trial Judge should, accordingly, have warned herself of the dangers of false implication. The learned counsel further asserted that there was no proper explanation as to why the four police officers who testified did not interview the neighbours in the locality where the deceased died.

Mrs. Kabende, learned Senior Legal Aid counsel, also advanced identical arguments in support of ground two of the subsequent grounds of appeal which ground, as we noted earlier, was similar in substance to ground one of the initial grounds of appeal to the extent that it raised issues of corroboration of the evidence of prosecution witnesses.

The learned counsel submitted that the record of proceedings shows that the learned trial Judge came to the conclusion that the 2nd and 3rd appellants had formed a common purpose with the 1st appellant to kill the deceased over the loss of their jobs through the testimonies of PW1, PW3 and PW6. Counsel pointed out that although PW1, in her evidence suspected the 3rd appellant to have been involved in the death of her husband, she had no evidence to prove the suspicion. The witness also confirmed in her evidence that she did not see the appellants on the day of the murder. Likewise, PW3 merely mentioned that the 2nd appellant had differences with the deceased over work related issues and did not see the appellants kill the deceased. The learned counsel then submitted that in criminal cases, the standard of proof being what it is, the court cannot be called upon to convict on mere

suspicion. According to counsel, this is what the evidence of PW1 and PW3 amounted to. She cited the case of **David Zulu v. The People**[1] as authority for this proposition. The learned counsel went on to submit that PW1 and PW3 were related to each other and to the deceased and their testimonies should have been treated with caution as they were suspect witnesses. She then quoted from our decision in the case of **Chipango and Others v. The People**[2] where we stated that:

> **"Where, because of the category in which a witness falls or because of the circumstances of the case, he may be a suspect witness, that possibility in itself determines how one approaches his evidence. Once a witness may be an accomplice or have an interest, there must be corroboration or support for his evidence before the danger of false implication can be said to be excluded."**

Counsel submitted that the trial Court should have satisfied itself that there was no false implication being made by PW1 and PW3 and that there was corroboration of their testimonies about differences occurring between the 1st and 2nd appellants and the deceased. Even if it were proved that the two appellants had differed over a work related issue with the deceased, counsel went on, that would not be sufficient to secure a conviction for murder.

The learned counsel then dispelled the evidence of PW5 and PW6, arguing that this could not amount to "something more" connecting the appellants to the crime. More pertinently she attacked PW5's evidence to the effect that he noticed that his bag containing a firearm went missing on 31st May, 2009 and confirmed this in cross-examination. The evidence before the Court, however, is that the murder occurred on 30th May, 2009. Counsel questioned how a firearm said to have been stolen on 31st May could have been used in a robbery on 30th May.

In his response on this ground, Mr. Mpalo, learned counsel for the respondent, stated that PW4 – Evans Musonda Ngosa, was aged 14 years at the time of the trial. Therefore, section 122 of the Juveniles Act, chapter 53 of the laws of Zambia, as amended by Act No. 3 of 2011 relating to evidence of children of tender years, does not apply to this witness. Counsel went onto submit that section 122 (b) of the Juveniles Act provides that where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support

thereof implicating the accused. The learned counsel then made the point that although the trial Judge conducted a *voire dire* in respect of PW4 and appeared to have received his evidence pursuant to section 122 of the Juveniles Act, this procedure was unnecessary as the said witness was not below 14 years; that PW4's evidence did not require corroboration under the Juveniles Act as amended. More purposely, counsel submitted that this ground of appeal lacks merit because the learned trial Judge did not, in any case, convict the three appellants on the basis of the evidence tendered by PW4; that the trial Judge expressly stated that she did not find credible the evidence of PW4 on seeing and identifying the 1st appellant, 2nd appellant and 3rd appellant on the night in question.

We have paid the closest attention to the rival submissions of the parties on this ground. The contention on behalf of the appellants as it relates to this ground has, in our view, two limbs. The first is that the conviction premised on the uncorroborated evidence of PW4, who was 14 years old, was erroneous. The second is that the conviction based on the evidence of the other witnesses was equally misguided, since all these other witnesses were unreliable because either their

evidence was full of contradictions or was discredited in cross examination, or because it required corroboration.

As regards the first limb, we totally agree with the submission of the learned counsel for the respondent that the judgment of the learned trial Judge shows quite candidly that she considered the evidence of PW4, as it related to identification of the appellants, as not credible. At J12 -13 of her judgment, the learned trial Judge in line 24 states that:

> **"I find some merit in his defence regarding the evidence of PW4, son of the deceased, whose evidence I did not find to be credible on the aspect of seeing and identifying Accused 1, Accused 2 and Accused 3 on the night in question. This, however, does not assist Accused 1 in view of the credible and unshaken evidence of PW6 and other prosecution witnesses."**

And at J15 line 4 – 11 the judge reiterated that:

> **"Regarding the testimony of PW4, as I earlier stated, I did not find the same credible. This is so because PW4 admitted not having mentioned either to the police or to his mother and relatives, the fact that he saw Accused 2 and Accused 3 on the material night. PW4 further admitted not mentioning Accused 3, despite seeing him at the deceased's funeral. It is thus, doubtful that PW4 who did not mention the accused person shortly after the incident could do so confidently after the passage of two years."**

It is clear from this passage that, the learned trial Judge discounted the evidence as to identification of the appellants as given by PW4, but nonetheless held that all the other evidence, taken together, supported the fact that the appellants were positively identified. This being the case, it is idle to argue, as the appellants, now do in ground one, that the evidence of PW4 constituted part of the basis for their conviction. It quite evidently did not.

The question which, given our observations above now becomes redundant and can only be decided *obiter*, is whether at 14 years, PW4 was a minor whose evidence required corroboration in terms of section 122 of the Juveniles Act, Chapter 53 of the laws of Zambia. This issue, in our view, has been correctly addressed by the learned counsel for the respondent in his submissions. We accept, as correct, the submission that at 14 years, PW4 was not in the category of witnesses to which section 122 of the Juveniles Act, as amended by Act No. 3 of 2011, applies. The *voire dire* conducted by the learned trial Judge, in respect of PW4 was supererogatory. We can only surmise that the trial Judge

conducted the *voire dire* out of abundance of caution. PW4's evidence did not require corroboration. We accordingly find this limb of the argument in support of ground one of the initial grounds of appeal, legally deficient.

The other part of ground one of the initial grounds of appeal alleges wrongful reliance by the trial Judge on the evidence of unreliable witnesses. Mr. Ngulube, in his submissions, referred us to the evidence of PW1, PW4, PW5 and PW9 to buttress his argument that these witnesses were unreliable and, therefore, that their evidence should not have been given weight. Much of Mr. Ngulube's criticism of the evidence of these witnesses lies in the gaps he perceives in the chain of evidence and the seemingly contradictory positions of these witnesses. In our view, these issues went to the credibility of the witnesses themselves rather than the category in which the witnesses fell. Evaluation of the credibility of witnesses and the weight to be placed on their evidence is a function for the trial Judge.

A perusal of the Judgment shows that the learned trial Judge did evaluate the evidence by the prosecution witnesses

and was satisfied that all the witnesses, apart from PW4, were reliable and their evidence was credible and proved the prosecution's case beyond reasonable doubt. We would be inclined to dismiss this limb of the appeal at this stage, but for the other issues raised by both Mr. Ngulube and Mrs. Kabende in their submissions, more pertinently the submissions on witnesses having a possible interest to serve; the circumstantial evidence accepted by the trial Judge and the treatment of the alleged confessions given by the appellants. These are all considered in the grounds following.

Mrs. Kabende raised very purposeful arguments regarding the treatment of the evidence before the Court by the trial Judge. The basis of the lower Court's finding that the appellants formed a common purpose was the testimonies of PW1, PW2, PW3 and PW6. PW1 and PW3 were related to the deceased while PW2 was a neighbour of the deceased. The evidence of PW2 was largely irrelevant to the identity of the appellants or their common purpose. The Judge should have exercised utmost circumspection in placing reliance on the evidence. That evidence required to be independently corroborated. The evidence of PW6 would be the only

corroborating evidence to that of PW1 and PW3 on this issue. However, the evidence of PW6 is itself a subject of challenge on account of being based on a confession which, counsel for the appellants argue, was not freely and voluntarily extracted.

As regards the treatment of the evidence of PW1, the deceased's wife; PW2, the deceased's neighbor and PW3, the deceased's young brother, we must state that the consistent position of this court has been that evidence of relatives and friends of the deceased should be treated with caution and circumspection since such witnesses may well have an interest of their own to serve, or may merely be biased. We guided in **Kambarage Mpundu Kaunda v. The People**[3] that as relatives and friends of the deceased may be witnesses with an interest to serve, it was incumbent upon a court in considering evidence from such witnesses, and that the court must go further and exclude such danger. In **Boniface Chanda Chola v. The People**[4], we stated that where a reasonable possibility exists that a witness may have an interest of his own to service, his evidence falls to be treated on the same footing as that of an accomplice. (See also **Simon Chooka v. The People**[5]). However, more recently

in **Yokonia Mwale v. The People**[6] we clarified the position in the following terms:

> **"We are of the firm view that insistence on the position that the evidence of every friend or relative of the deceased or the victim must be corroborated, is to take the principle in the case authorities on this point out of context."**

We reaffirmed what we had stated in the earlier case of **Kambenja v. The People**[7] that:

> **"....in the present case, the trial judge did note that the appellant was a neighbor of the victim's family and he was well known to PW3. There is no suggestion from the record of proceedings suggesting the presence of particular circumstances which could have motivated PW3 to give false evidence, and there is no evidence suggesting poor neighbourly relations between PW3, the rest of the victim's family on one hand and the appellant on the other. We, therefore, do not find any reason to fault the trial court's acceptance of the evidence of PW3, as providing the necessary corroboration to the evidence of PW4 and PW5, the victim."**

We made a similar observation in **Guardic Kameya Kavwana v. The People**[8] where we observed that:

> **"...there is no law which precludes a blood relation of the deceased from testifying for the prosecution. Evidence of a blood relation can be accepted if cogent to rule out any element of falsehood and bias. ...what the court must consider as an**

> **abiding factor is the truthfulness of the witness touching on his integrity and believability as well as his personal knowledge of the matter. Whether corroboration is or is not required is not a matter that, in our view, can be prescribed for all cases for all times."**

This is why we guided in **Muchabi v. The People**[9] that:

> **"...a witness with an interest to serve must be treated as an accomplice and his evidence tested to see whether it was corroborated or whether there was a reason for believing it in the absence of corroboration"**(underling ours for emphasis)

What emerges from all these authorities is that each case will be treated on its own merits. As to whether or not there was any danger of false implication regarding the evidence of PW6, PW7 and PW9, we think, with respect that there was none. The evidence of these three witnesses needed no corroboration in our view. There was, therefore, no misdirection on the part of the trial court in this regard.

We now turn to ground two of the initial grounds of appeal which alleges that the conviction of the appellants was wrong because there was no direct evidence that the three appellants worked on a common purpose. Mr. Ngulube referred us to the portion of the judgment where the learned trial Judge came to the conclusion that the three appellants worked together on a

common purpose based on the testimonies of PW1, PW3 and PW9. He also referred us to the apparent contradictions in the evidence of PW1, PW4 and PW9.

The learned counsel further argued that the State did not prove that the appellants acted with a common purpose. He submitted that the conclusion made by the trial Judge that the 2nd appellant and the 3rd appellant were accessories after the fact in terms of section 21(1) (a)–(c) of the Penal Code, Chapter 87 of the laws of Zambia, was not supported by the evidence before her. Counsel added that the court's finding in this regard was so perverse that no reasonable judge, given the same set of facts, would come to such a conclusion.

Mrs. Kabende echoed Mr. Ngulube's argument that the prosecution failed to prove that the appellants shared a common unlawful purpose or enterprise, or a common design to justify the raising of the doctrine of common purpose as envisioned in section 22 of the Penal Code. She contended that in order to convict the appellants for the offence charged under the doctrine of common purpose, which the trial Court appeared happy to apply, it was necessary for the court to

consider the general resolution of the group. Counsel referred us to the case of **Mwape v. The People**[10] on the ingredients of a joint unlawful enterprise and concluded that there was no such purpose disclosed on the evidence.

Counsel also complained that it was a misdirection for the Court to have found a shared common purpose on the evidence of PW9, premised on a confession, which she argued elsewhere, was inadmissible. She cited the case of **Haonga and Others v. The People**[11] where it was stated 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. She submitted that as there was no eye witness to the shooting and it is uncertain who shot the deceased, the doctrine of common purpose should not have been applied.

In riposte the learned counsel for the respondent submitted that although there was no direct evidence implicating the three appellants, the learned trial Judge found them all guilty on the basis of very compelling circumstantial

evidence. He further submitted that the court below considered, firstly, the fact that there was a possible motive for the murder of the deceased by the appellants and secondly, the evidence of leading and, thirdly, the admission and demonstration by the appellants at the scene of crime. On this basis, counsel submitted that there was no misdirection on the part of the learned trial Judge.

We appreciate the submissions of counsel for both parties on this ground. We see the force in Mrs. Kabende's submissions in this connection. We are of the view that the part of this ground which relates to common purpose calls for a consideration of sections 22 and 200 of the Penal Code. Section 22 of the Penal Code provides as follows:

> **"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."**

The question is whether on the evidence before the lower court, the three appellants could fairly be said to have had a

common intention to prosecute an unlawful purpose in conjunction with one another.

Implicit in ground 2 of the initial grounds of appeal was that absence of direct evidence against the 2nd and 3rd appellants made the conviction of the appellants on the basis of a common purpose unsafe.

As we indicated at the outset, the evidence before the learned trial Judge was largely circumstantial. She fully appreciated this fact and did in her judgment allude to our guidance in the case of **David Zulu v. The People**[1] where we stated that:

> **"It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt."**

In this connection the initial evidence on the question of the joint unlawful enterprise is that of PW1, PW3, PW5 and PW9.

PW1, in her evidence, told the Court that she did not see the assailants on the fateful night. She, however, stated in re-examination as follows:

> **"- Yes, the three accused were brought to my house**
>
> - **By saying they were not free, it is because all of them were beaten in Mkushi**
>
> - **They came when they were already beaten and they demonstrated how they came, where they hid and where they hid the gun.**
>
> - **They showed where they stood and demonstrated what they did."**

This same witness had in cross examination given evidence recorded as follows:

> **"-I did not say that (tell the police) that Robert had differed with my husband and that I suspected him.**
>
> **Witness referred to statement. Witness confirmed the names and that she told the police that she suspected Robert as he had differed with her husband. I did not see Robert on that day. They never used to talk to each other and so he never used to come up. They differed over work related issues. Yes, I told the police I suspect Robert but I do not have any evidence..."**

The relevant part of PW3's evidence was in cross-examination when he said at page 7 of the record of proceedings that:

> **"Yes, I told the police that the deceased had differences with some fellow workers at his workplace. The police picked only one who had differences with the accused. The police left the other two who had differences. I only told the police about John Chibuye (A2). They differed over work and there were threats to use witchcraft."**

More crucially, on page 17 of the record of proceedings, is the evidence of PW5 which was recorded and as quoted by counsel for the respondent in her submission reads as follows:

> **"a few days later, whilst at the camp, the police came with three men and the one I came to know as Jericks, started demonstrating how he got at the camp."**

and:

> **"From there, I was taken to Sable to where he went at Sable Farms... The three men came with the police, started demonstrating how they went to the place."**

PW9, for his part, stated in his evidence in chief as follows:

> **"I requested Accused 1 to lead me to where he got the firearm... I then asked the three accused if they could lead me to where they murdered the deceased. At the second scene, the three accused were cautioned verbally that they were not obliged to**

demonstrate. They all agreed and went ahead and demonstrated how they murdered the deceased."

The learned trial Judge, in evaluating the evidence before her, observed that the three appellants had a common issue against the deceased whom they accused of having been responsible for their dismissal from Sable Farm; they led the police to the crime scene and had demonstrated how they committed the crime.

Leaving fora moment the arguments on the admissibility or the probative value of the evidence of the witnesses on this point, it seems to us that the evidence, on the face of it, would appear to establish a common motive for the murder of the deceased by the appellants. It also establishes leading of a police officer to two different scenes, and it equally establishes demonstration at the crime scene.

As was stated by Charles, J in the Court of Appeal, predecessor to this court, in the case of **Mutambo & Others v. The People**[12]:

"The formation of a common purpose does not have to be by express agreement or otherwise premeditated; it is sufficient if two or more persons join together in the prosecution of a

purpose which is common to him and to the other or others, and each does so with the intention of participating in the prosecution with the other or others."

In this case, therefore, it need not have been proved that the three appellants had an agreement to execute a common unlawful purpose for a conviction to hold. It is sufficient that the evidence adduced showed that they worked together in prosecuting an unlawful purpose. But, as pointed out by Mrs. Kabende for the appellant, PW1 did not see the appellants on the day of the commission of the offence and merely had suspicion that they were involved in the killing of the deceased. PW1 further contradicted herself in her evidence when she stated that she had not told the police about her husband having a difference with Robert, the 3rdappellant, only to retract her statement when the statement she made to the police was shown to her. Likewise, PW3 merely stated that the 2nd appellant had differences with the deceased but did not see any of the appellants kill the deceased. PW2 did not witness, as it were, anything much of relevance to the commission of the crime while PW4's evidence was totally discounted by the trial Judge herself. We come to the conclusion that it was unsafe for

the Judge to have relied on this evidence to convict the appellants on the basis of a common purpose.

As regards ground three of the initial grounds of appeal, it is the contention of counsel for the appellants that the lower Court did not consider the alibi raised by the 3rd appellant which was not challenged by the prosecution. No arguments, written or oral, were preferred by Mr. Ngulube, the learned counsel for the appellants on this ground save for a sentence to the effect that the third appellant raised an alibi which the State failed to investigate.

Mrs. Kabende never raised this issue in the subsequent grounds and in her submissions before us. The learned counsel for the respondent, however, submitted in his heads of argument that although an alibi places the burden on the crime investigators to investigate it and ascertain its veracity, it can only be so investigated if it is given at the earliest possible time. He further argued that in this case, there was no dereliction of duty on the part of the investigators since, as the learned trial Judge found, the alibi was an afterthought.

We have considered this ground of appeal and are inclined to dismiss it on the basis of the numerous authorities which we now consider.

In the case of **Bwalya v. The People**[13], we dealt at length on some of the requirements that need to be considered by a court faced with a defence of alibi. In that case, the appellant denied the charge and alleged that on the day the crime was committed he was in Kabwe. In his evidence given on oath, the appellant did not allege to have been in Kabwe on the day in question but said on the day he was apprehended he had that morning come from Kabwe. He called no witnesses. The trial Magistrate commented that "the accused puts forward the defence of an alibi, but is not able to substantiate the same in any way."

In considering the propriety or otherwise and the effect of the Magistrate's comment concerning the alibi, we held that the Magistrate's comment could be read as suggesting that there is some onus on an accused person to support an alibi. Such an approach is wrong as the law relating to the onus of proof of an alibi is that once evidence thereof fit to be left to a jury has

been adduced, the onus is on the prosecution to negative the alibi.

We further held that simply to say 'I was in Kabwe at the time' does not place a duty on the police to investigate; this is tantamount to saying that every time an accused says "I was not there" he puts forward an alibi which places a duty of the police to investigate. We held that the appellant should, in that case, have given the names or addresses of the people in Kabwe in whose company he alleged to have been on the day in question. Then it would have been the duty of the police to investigate. The appellant not having done so, we decided that there was no dereliction of duty on the part of the police.

In **Simutenda v. The People**[14], we held that a court is not required to deal with every possible defence that may be open to an accused person unless there is some evidence to support the defence in question, i.e., "evidence fit to be left to a jury".

On the other hand, in **Nzala v. The People**[15], where the appellant in his statement to the police immediately on apprehension, denied any knowledge of the event and informed the police officer of the place he had been to the day in question

and the people in whose company he had been, it was held that in those circumstances it was the duty of the police to investigate the alibi.

In **Lubinda v. The People**[16], the Court of Appeal (Doyle CJ), stated among other things that:

> **"Furthermore, there was the fact that the investigators knew within a few days of the crime the nature of the defence and that his was an alibi. She knew in the case of the appellant that his alibi was that he was in the mess that night with two other named soldiers to be on the investigation of this part of the case...**
>
> **...in a proper case and on a proper direction, it is open to any court to find that they believe witnesses and do not believe other witnesses. In this case, we are faced by the fact that the whole evidence for the defence has been seriously prejudiced by a dereliction of duty on the part of the investigating officers. Had an investigation of the alibi taken place, it might have been in favour of the appellants. We do not consider that the evidence given for the prosecution was such that it was so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."**

On the basis of these authorities, we agree with the learned counsel for the respondent that the defence of alibi in

this case cannot hold. Ground three is accordingly dismissed for want of merit.

In ground four of the initial grounds, the learned counsel for the appellants contended that the trial Court erred in law and in fact by admitting otherwise inadmissible evidence obtained against the 3rd appellant after being beaten by the police as confirmed by PW1 and by duress during investigations. This is similar to the ground canvassed by the learned Senior Legal Aid counsel in ground one of the subsequent grounds of appeal.

In his written heads of argument on this ground, Mr. Ngulube narrowed the argument to the evidence of PW1, whom he said confirmed that the 3rdappellant was beaten by the police and was limping at the time he went to the crime scene to demonstrate and that this appellant and others were not free when they were demonstrating how they committed the crime.

According to counsel, despite confirmation by PW1 in her re-examination that the three appellants had been beaten in Mkushi, the learned trial Judge failed to state why she did not consider this issue in her Judgment, especially as it related to a

witness whose evidence she apparently heavily relied upon. According to counsel, the learned trial Judge ought to have made a finding as to the voluntariness of the alleged confession, and leading demonstrations.

The learned counsel for the appellant then turned to the evidence of PW9 who relied on the alleged confession statements in the warn and caution, which statements were never produced.

In rehashing the argument on ground one of the subsequent grounds of appeal, which as we said, materially mirrors ground three of the initial grounds of appeal, Mrs. Kabende referred us to the lower Court's judgment to show that the Court unduly placed much reliance on the evidence of PW9, the arresting officer. According to the learned counsel, the substance of PW9's evidence lay in the confession allegedly made to him by the appellants that there was an agreement amongst themselves, to murder the deceased. Such confession was, however, made in the backdrop of the beating received by the appellants from the investigating officers. To substantiate this assertion, the learned counsel also referred us to the

evidence of PW1 where the witness testified that when the three accused persons were taken to the witnesses' place, one of them called Robert, was limping as he had been beaten by the police. The learned counsel further referred us to the testimony of the 1st appellant in his defence where he told the trial Judge that he was badly beaten and he thereafter, told the police to write what they wanted. Counsel also referred us to the testimony of the 2nd appellant and that of the 3rd appellant all of which alleged beating of the appellants by the investigators. Counsel submitted that in view of this evidence, the issue of the voluntariness of the confession statements arose and the trial Court was duty bound to consider the voluntariness of the confession statements notwithstanding that there was no objection from the appellants' counsel. She referred us to the case of **Muwowo v. The People**[17] where the Court of Appeal said:

> **"An incriminating statement made by an accused person to a person in authority is not admissible in evidence unless it is proved beyond reasonable doubt to have been made by him voluntarily."**

The learned counsel also cited the case of **Lumangwe Wakilaba v. The People**[18] where it was held that:

> **"It is mandatory for the trial magistrate after the issue of voluntariness had been raised to conduct a trial within a trial notwithstanding that the prosecution had already closed its case."**

The learned counsel further submitted that PW9's testimony was full of contradictions in regard to the alleged confession. He referred us to portions of the record of appeal where PW9 implied that there were confessions made to him by all the three appellants after warning and cautioning them. The same witness elsewhere stated that the appellants denied the charge, and later, that the appellants confessed to the murder. Furthermore, added counsel, PW9 stated that he was not present during the time warn and caution statements were being recorded from the 1st and 2nd appellants.

The crux of Mrs. Kabende's argument on this point was that with the contradiction as highlighted in regard to the confession, there was no proper basis for the learned trial Judge to have accepted the evidence of PW9 as conclusive.

Counsel then argued the point on the alleged demonstration by the appellants on how the murder was perpetrated and the subsequent leading allegedly made by the

1st appellant as to where the gun used in the shooting was hidden and later found. She submitted that the same rules as apply to confession statements, apply to evidence of demonstration and leading. Counsel submitted that the Court should have satisfied itself that both the demonstration and the leading were done voluntarily by the appellants. She cited, in this regard, our decision in the case of **Boniface Chanda Chola, Christopher Nyamande and Nelson Sichula v. The People**[4] and reiterated her submissions that the alleged confession statements, the demonstration and the leading, were all not free and voluntary.

In response, Mr. Mpalo, learned counsel for the respondent, conceded in his heads of argument, that it is indeed the duty of the trial Court in all cases, even if the question is not raised by the defence, to satisfy itself as to the admissibility of an incriminating statement. Counsel observed that in the present case, the record does not show that a trial-within-a-trial was conducted on the issue of the alleged confession, nor was there any ruling on the point by the Court. He admitted that this was an irregularity as was held in **Wilfred Kashiba v. The People**[19]. However, counsel submitted, that the

trial Court would have come to the same conclusion on the remainder of the evidence relating to the firearm and that of personal identification by PW6 and PW8.

We have carefully considered the opposing submissions of the parties on this point and especially the tradable concession of the learned counsel for the respondent on the duty of the trial Court when faced with any suggestion that a confession made by an accused person may not have been made freely and voluntarily. The position of the law on this question is as appropriately explained in the cases cited by the learned counsel for the appellants.

The question that we ought to address is whether, if the alleged confessions of the three appellants were excluded, the conviction of the appellants could be supported on the remainder of the evidence. To use the words of our brother Bruce – Lyle, Ag. JS (as he then was) in **Mbewe v. The People**[20] could the evidence standing alone without the alleged confession statement irresistibly point to the guilt of the appellant?

We are mindful of what we stated in **Kasuba v. The People**[21] that when a witness is about to give evidence as to an alleged confession, the court should inquire whether the accused objects to the admission of that evidence. We further stated that failure so to inquire is an irregularity which can be cured if it can be shown that there was no prejudice to the accused.

In the present case, although the confession statements were not produced in evidence, the Judge was satisfied that the evidence of admission to PW9 by the 2nd appellant and the 3rd appellant leading to the arrest of 1st appellant coupled with the evidence of demonstrating or leading is cogent and takes the circumstantial evidence out of the realm of conjecture to support an inference of guilty.

Although the treatment of the confession statements by the trial Court was inappropriate, and could clearly prejudiced the appellants this was never in fact the case. She ought not to have placed undue weight on the evidence of the alleged confession, without, in the first place, satisfying herself through a trial within a trial, of the voluntariness of the confession. This ground of appeal is bound to succeed. However, the question

we ask again is whether it could be said that the evidence before the trial Court would, barring the confession statements and the demonstration and the leading, support a conviction of the appellants? The answer to this question, in our view, lies in the evaluation of the evidence of all the other witnesses.

This should lead us to consider the evidence of the witnesses in regard to each of the three appellants. The 1st appellant was the only one identified at the identification parade by PW6. The 2nd and 3rd appellants were not identified. The 1st appellant spent some time with PW6 not long before the firearm used in the murder went missing. He was the one who demonstrated how he stole the firearm and he led the officers to where he had hidden it. That firearm disappeared from PW5's camp when the 1st appellant had also disappeared from the same place, leaving PW6 in deep sleep – after apparently drinking a laced substance.

We do not think that PW6 can be considered as a witness with an interest to serve. He had no connection to the 1st appellant and was effectively a victim of a theft in a sense. The aggregate of all these circumstances present odd coincidences

which point to nothing else but the participation of the 1st appellant in the unlawful enterprise.

The only evidence against the other two appellants was from PW9. It related to how they were apprehended and the confessions they allegedly made to him of their involvement in the murder. We have already pointed out that the confession was challenged and yet there was no trial-within-a-trial conducted. Granted that the main evidence against the 2nd and 3rd appellant was their own confession which in this case ought to be discounted for the reason we have given, it follows that their conviction was unsafe.

In the result, the appeal by the 1st appellant fails. Those by the 2nd and 3rd appellants succeed. The 2nd and 3rd appellants are acquitted and discharged accordingly.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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Dr. M. Malila, SC
SUPREME COURT JUDGE