IN THE SUPREME COURT OF ZAMBIA **SCZ/9/99,100/2013**
HOLDEN AT KABWE **Appeal No. 99/100/2015**
(Criminal Jurisdiction)

B E T W E E N :

ABEDINEGAL KAPESH **1ST APPELLANT**

BEST KANYAKULA **2ND APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Mambilima CJ, Mwanamwambwa DCJ, Phiri, Muyovwe and Malila, JJS on 11th August, 2015 and 6th September, 2017**

For the Appellants: Mr. A. Ngulube, Director, Legal Aid Board

For the Respondent: Ms. N. T. Mumba, Deputy Chief State Advocate, National Prosecutions Authority

---

J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Haonga and Others v. The People (1976) ZR 200*
2. *Mvula v. The People (1990-1992) ZR 54*
3. *Kambarage Mpundu Kaunda v. The People (1990-1992) ZR 215*
4. *George Wamundila v. The People (1978) ZR 151*
5. *Webster Kayi Lumbwe v. The People (1986) ZR 93*

6. *Katebe v. The People (1975) ZR 13*
7. *Kashenda Njunga and Others v. The People (1988-1989) ZR 1 Francis*
8. *Francis Mayaba v. The People (1999) ZR 44*
9. *Ernest Mwaba and Others v. The People (1987) ZR 19*
10. *Dickson Sembauke and Another v. The People (1988-1989) ZR 144*
11. *Mwiba Mukela v. The People (2012)(2) ZR 387*
12. *Mutambo and 5 Others v. The People (1965) ZR 15*
13. *London Chisulo and 2 Others v. R (1961) R & N 116*
14. *Boniface Chanda Chola v. The People (1988-1989) ZR 163*
15. *Yokoniya Mwale v. The People (Appeal No. 205/2014)*
16. *Guardic Kameya Kavwana v. The People (Appeal No. 84/2015)*
17. *Patrick Mumba and Others v. The People (2004) ZR 202*
18. *Jack Chanda and Kennedy Chanda v. The People [SCZ Judgment No. 2 of 2002]*
19. *Chishimba v. The People (Appeal No. 17 of 1999)*
20. *Mbomena Moola v. The People [SCZ Judgment No. 35 of 2000]*
21. *Nelson Bwalya v. The People [SCZ Judgment No. 29 of 2010]*
22. *Steak Chibale v. The People (Appeal No. 62 of 2013)*
23. *Abel Banda v. The People (1980) ZR 105*
24. *Practice Statement (1966) 3 ALL ER 77*
25. *Paton v. Attorney General (1968) ZR 185*
26. *Match Corporation Limited v. Development Bank of Zambia and Attorney General (SCJ Judgment No. 3 of 1999)*
27. *Edgington v. Fitzmaurice (1885) 29 Ch.D 459*
28. *R. v. Fabian Kinene S/O Mukye & Others (1941) EACA 96*
29. *Mangomed Gasanalieu v. The People (2010)(2) ZR 132*
30. *Berejena v. the People (1984) ZR 23 (Reprint)*

Legislation referred to:

1. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *Penal Code, chapter 87 of the laws of Zambia*
3. *Witchcraft Act, chapter 90 of the laws of Zambia*

Other works referred to:

1. *UN Committee on the Rights of the Child (Reports submitted by States parties under Article 44 of the Convention)*

2. *UN Committee on the Elimination of Discrimination against Women (Concluding Comments; India, Papua New Guinea; Tanzania; Mozambique; Ghana; South Africa)*

October of 2011 was arguably a dark month for the people of Mukunashi area, in Kasempa District of North-Western Province of Zambia. Three tragic deaths occurred in quick succession. Winne Kabinga's death on 27th October, 2011 drew public attention to a phenomenon that has ensnared the belief system in Zambia among traditional rural and modern non-rural communities alike and which has effectively become a subcultural belief or ideation – witchcraft, and the awe with which a suspected witch or wizard is viewed.

Although there was evidence given in the lower court that Winne Kabinga died after consuming, the previous day, a sizeable quantity of *kachasu*, an exceedingly potent local alcoholic brew, and also that he had complained of, among other things, stomach pain prior to his demise, the spotlight settled on ideas of the evil power of witchcraft to explain the occurrence of his unfortunate death, particularly given a set of other coincidences. This became the motivating force behind the seemingly savage attacks on two other elderly villagers who were identified as witchcraft practitioners – Pardon Munanga and Edson

Masonde (hereinafter called 'the deceased') – leading to their awful deaths on or about the 30th October, 2011.

The specific witchcraft belief implicated in the present appeal involves what in *Kikaonde* is known as *kikondo,* meaning a moving coffin charged with some supernatural force. It is believed that a coffin in which a body of a dead person is laid will, once appropriately smeared with *mumone,* an indigenous charm or medical preparation, and given commands by relatives of the dead person, assume supernatural powers and effectively overpower the pall-bearers and lead them to the person who killed, through witchcraft, the dead person lying in it. The coffin is also believed to acquire the ability to identify, isolate and hit the witch or wizard. At that stage, rough justice and mob violence by members of the community are directed at the identified witch or wizard who is made to suffer harassment and assault, and in some cases, even death. In doing so, those participating in the acts of violence against the alleged witch or wizard believe that they are carrying out a praiseworthy act of community duty. It is in such circumstances that the fate that

attended the two deceased persons, subject of this appeal, was sealed.

The two appellants were indicted on two counts of the murder of the two deceased persons contrary to section 200 of the Penal Code, chapter 87 of the laws of Zambia. They were alleged to have, at Kasempa in the North-Western Province of Zambia, on or about the 30th October, 2011, jointly and whilst acting together with others unknown, murdered the two deceased persons in separate but related incidents. They, of course, pleaded not guilty.

As earlier intimated, the events that culminated in the murders of the two deceased persons were characteristically unusual and exceedingly dramatic. They were narrated to the trial court by prosecution witnesses and the appellants themselves. In a spirited attempt to prove its case against the two appellants, the prosecution marshalled six witnesses of fact while the two appellants testified on their own behalf and called no other witnesses. The narrative of events given by those witnesses was that on 26th October, 2011 at Shapawa's Village in Kasempa, the late Winne Kabinga, together with

others who included PW3, Mwaba Musonda, the deceased Pardon Munanga, and one Namumbuma, were drinking alcohol. Winne Kabinga then volunteered information to Munanga that people in the village detested him owing to his witchcraft practices and were planning to kill him. Kabinga advised Munanga to relocate from the village. No unusual incident was recorded involving Pardon Munanga and the late Kabinga following the latter's advice to the former. However, Kabinga died the next day on the 27th October, 2011 following complaints of some abdominal pain.

The real drama, however, started to unfold on the day of the burial of Kabinga. As is common in many village settings, some explanation for his death had to be found before he was interred. The second appellant, Best Kanyakula, together with others, prepared some concoction or African charm, called in *Kikaonde* as *mumone*, which included mealie meal powder. Relatives of the late Kabinga then smeared the medicine on the coffin in which lay the body of the late Kabinga. They thereafter hit the coffin with a stick and directed the late Kabinga or his spirit to tell them who had killed him. Pall bearers then lifted the coffin and ran with it across a village path to

Pardon Munanga's house. There, the coffin, while being carried by pall-bearers, hit Munanga's house, damaging the door in the process. It then came out and went to where Munanga was and hit him. A mob of mourners thereupon descended on him, severely assaulting him with stones and bricks. They made him go around a hut and let him sit on a pounding mortar while leaning onto the wall of the hut. He lost consciousness and fell off the mortar. The beating, however, continued. He was later burnt with some plastic substances until he died.

The party then shifted to Edson Masonde's house which was about 75 meters away from Munanga's house. Upon seeing the pall bearers, the coffin and the mob, Masonde tried to run away but the mob caught up with him, assaulted him severely with stones and sticks until he too was dead.

The two appellants were positively identified as having been in the assaulting party. They were subsequently charged, arrested and tried for murder.

After a painstaking evaluation of the evidence, the learned trial judge was convinced that the prosecution had proved its case against

the two appellants beyond reasonable doubt. She convicted them and sentenced them to life imprisonment as, in her view, the belief in witchcraft, which animated the murder of the two deceased persons, was an extenuating circumstance.

Disconsolate with the High Court judgment, the appellants launched the present appeal against conviction and sentence, fronting three grounds structured as follows:

> **Ground one**
>
> **The trial court erred in fact and in law by finding that the prosecution witnesses were consistent and articulate and did not contradict themselves, yet the evidence shows contradictions and lack of credibility.**
>
> **Ground two**
>
> **The trial court erred in law to convict the appellants of murder.**
>
> **Ground three**
>
> **The trial court erred in law to sentence the appellants to life imprisonment as the sentences were excessive.**

The appellants' learned counsel filed heads of argument on 29th July, 2015. Counsel for the respondent, upon obtaining leave, filed heads of argument in open court on the 11th August, 2015. We also allowed the appellants' learned counsel seven days from the date of hearing

to file heads of argument in rejoinder. These were filed on 14th August, 2015.

In regard to ground one, Mr. Ngulube, learned Director of Legal Aid, appearing for the appellants, submitted that PW1, Edward Masonde, who was the son of the deceased Edson Masonde, and the nephew of the deceased Pardon Munanga, was a witness after the fact. He was in Solwezi where he lived at the time of the fateful incident and was merely called after the deaths in issue had occurred. As regards PW2, Evelyn Munanga, the younger sister of the deceased Pardon Munanga, counsel pointed out that she testified that both appellants were present at the scene of the crime together with others. Although she narrated that she saw how the deceased were savagely assaulted, the witness did not say what role, if any, the appellants played in the beating of the deceased (Munanga). According to counsel, it was not sufficient that the witness merely testified that the two appellants were part of the group that assaulted the deceased. She ought to have particularized their involvement.

In regard to the deceased Masonde, counsel submitted that the testimony of PW2 revealed that she did not witness his being beaten

but merely found him "lying down and half buried." Counsel submitted that there was clearly a discrepancy in the evidence of this witness. She testified in chief that she witnessed the beating and saw the assailants using sticks to beat Masonde, yet in cross-examination, she recanted this assertion. According to the learned counsel, the weight to be attached to the evidence of this witness is significantly diminished if not altogether eroded. Relying on the principle we set out in **Haonga and Others v. The People**[1] which dealt with the weight to be placed on the evidence of witnesses who had been found untruthful on a material point, he submitted that the evidence of PW2 ought to have been discounted.

The learned counsel did not leave matters there with respect to this witness. He pointed to a portion of her testimony in conclusion where she stated that she did not get on along well with the first appellant. The learned counsel suggested that, that statement alone revealed a clear basis or motivation that could have driven the witness to falsely implicate the first appellant. Citing the case of **Mvula v. The People**[2] as authority for his submission, he argued that the lower court should have treated the evidence with caution.

As regards the second appellant, counsel contended that PW2 had mistakenly identified him as Saddam Kanyakula. We were referred to the part of PW1's evidence in the record of appeal where this mistake in identity is recorded. Counsel urged us to treat the evidence of this witness as unreliable.

Regarding the evidence of PW3, Mwaba Musonda, grandson to the deceased Pardon Munanga, the learned Director of Legal Aid submitted that PW3 did not witness the beating or killing of both of the deceased. All he gave was evidence as to who was present and the commotion that ensued when the rowdy group of mourners went to the deceased Munanga's house. According to counsel, this witness had run away upon being chased, and yet in cross-examination and re-examination, he testified that he actually witnessed the assault of Munanga by the appellants and others. The witness also said nothing about the assault or killing of Masonde. In the submission of the learned counsel, the testimony of this witness was not useful at all in providing a basis for the conviction of the appellants.

Moving on to PW4, Boniface Kakeza, the younger brother of the deceased Munanga and cousin to the deceased Masonde, it was

counsel's submission that this witness was not specific about who participated in the actual beating of the deceased Munanga and did not state what role, if any, the appellants or any other person played. Even if he claimed to have witnessed the beating of the deceased Masonde, this witness did not, according to Mr. Ngulube, state who was present and who participated in the beating. The witness also stated that it was difficult to say who did what in the commotion and that he was not there when the deceased Masonde was assaulted.

PW5, was Onnie Kanyenda, the elder sister of the deceased Munanga. According to counsel for the appellants, she was the only witness who said she saw the appellants get sticks and beat Munanga, but she did not go to where Masonde was assaulted and subsequently killed. Counsel submitted that in cross-examination, PW5's version of events changed when she said there was a mob and she could not pin point who did what. Counsel also submitted that PW5 and Munanga were related and as such her evidence needed to be corroborated. He cited the case of **Kambarage Mpundu Kaunda v. The People**[3] and that of **George Wamundila v. The People**[4] in support of the submission that relatives or friends of a victim may have a possible

bias against an accused person or an interest of their own to serve and their evidence should thus be treated with utmost caution and in the same way as evidence of suspect witnesses.

Concerning PW6, Detective Inspector Mulele Musonda, it was submitted by Mr. Ngulube that he was a formal witness whose investigations did not reveal anything that could be linked to the appellants and the deaths of the deceased persons.

Counsel concluded that there was boundless suspicion regarding the participation of the appellants in the beating and murder of the two deceased persons, yet there was no tangible and reliable evidence that could properly ground the conviction of the appellants. We were beseeched to allow ground one of the appeal.

In responding to the appellants' arguments under ground one, Ms. Mumba, learned counsel for the respondent, supported the conclusion of the trial court on the evidence of prosecution witnesses. She submitted that PW2, PW3, PW4 and PW5 were all reliable witnesses and the court was thus on firm ground when it placed absolute reliance on their testimony. Their evidence, according to the learned counsel, that both appellants were present at the scene

of the crime where the assault occurred, is confirmed by the appellants themselves, both of whom testified that they were present at the scene. She further submitted that it is clear from the evidence of PW2 that he was standing 5 to 6 meters away from where the coffin was picked and it was in the morning. He saw a mob of people who included the appellants. In the learned counsel's view, PW2's credibility was all the more enhanced when she testified that the deceased Munanga was a wizard, and also when she revealed that she did not get along well with the first appellant.

Concerning the evidence of PW3, the Deputy Chief State Advocate submitted that the record reflects that this witness was present when the assault on Munanga started and that he only ran away after he was threatened by the appellants and others who were jointly assaulting the deceased. The learned counsel submitted that witness testified that he actually saw the appellants together with others assaulting the deceased before he was chased. Counsel referred us to the part of the lower court's judgment where PW3 was described in glowing terms by the trial judge as "very alert and explained all details very well"; that he was "sharp and articulate."

Relying on the case of **Webster Kayi Lumbwe v. The People**[5], the learned counsel submitted that an appeal court will not interfere with a trial court's findings of fact on the issue of credibility unless it is shown that such finding was erroneous. There is, according to counsel, nothing in the record of appeal which showed that the finding of the lower court on the credibility of PW3 was erroneous.

As regards PW4 and PW5, Ms. Mumba observed that the record unambiguously shows that both witnesses were present at the scene and that this was also confirmed by the second appellant. PW4, according to the respondent's counsel, plainly stated in his evidence that he saw the deceased Munanga being beaten by a mob which included the appellants. Equally PW5 testified that she was present at the scene and saw the appellant actively participating in assaulting the deceased.

The learned counsel for the respondent made one more point under this ground of appeal, namely, that although the prosecution witnesses fell within the category of witnesses we referred to in the case of **Kambarage Mpundu Kaunda v. The People**[3] as witnesses with a possible interest of their own to serve, there was sufficient

corroboration of their evidence, and equally there was no motive established to falsely implicate the appellants, especially the second appellant, who was related to the witnesses. She also cited the case of **Katebe v. The People**[6] to support her submission on the absence of a motive to falsely implicate the appellants. Counsel urged us to dismiss ground one of the appeal.

On 14th August, 2015, the appellant filed their heads of argument in reply. They effectively rehashed the arguments already made on behalf of the appellant.

We have carefully considered the clashing arguments of counsel on ground one of the appeal. To recap the appellants' grievance at the risk of repetition, it is simply this: that the trial court made a wrong assessment of the evidence of the witnesses and did not deal with the pertinent issue of the credibility of those witnesses appropriately. It was also the learned counsel's argument that the prosecution evidence was riddled with fatal inconsistencies, contradictions and gaps and was, according to counsel, founded on mere suspicion. He submitted in a nutshell that none of the prosecution witnesses, PW1, PW2, PW3, PW4 and PW6 gave cogent

evidence positively linking the appellants to the assault and subsequent deaths of the deceased or either of them. He conceded though that PW5 testified that she saw the appellants pick-up sticks and assaulted the deceased. According to Mr. Ngulube, this witness however, whittled down the value of her evidence when, in cross-examination, she explained that she did not see for certain who did what exactly. More poignantly, the learned counsel also raised the issue of the relationship of the witnesses to the deceased and the inherent likelihood that as witnesses with a possible bias or an interest of their own to serve, they falsely implicated the appellants. Ms. Mumba's reaction in a nutshell was that the evidence of the prosecution witnesses was cogent and the court's assessment of it cannot be faulted.

Regarding the complaint by the appellants that the trial court did not perform appropriately its function when assessing the witnesses' testimony, particularly as it touched on the credibility of the witnesses, our immediate reaction is that this argument is unavailing. We have time and again repeated the position of the law

which we have consistently upheld, that ascription of the probative value to the evidence of witnesses is preeminently the business of the trial judge who had the privilege to witness the drama in court. A trial judge will have seen the witnesses, assessed their demeanour and, therefore, stands to have a more creditable perception of the credibility of those witnesses. As an appellate court, we are loath to disturb any findings of fact made by a trial judge, more especially if the issue turns on the credibility of witnesses. In **Webster Kayi Lumbwe v. The People**[5] we stated thus:

> **An appeal court will not interfere with a trial court's finding of fact, on the issue of credibility unless it is clearly shown that the finding was erroneous.**

From the submissions of the learned counsel for the appellants we do not find any cogent basis upon which anchors his contention that the trial court's assessment of the credibility of the witnesses was flawed. To the contrary, our view is that the lower court made a meticulous assessment of the credibility of the witnesses. It is not at all apparent to us on any realistic view of the evidence before her, that such assessment was so erroneous as to prompt us to disturb it. We reject the arguments of the learned counsel for the appellants

on this point. This means ground one of the appeal is bound to fail, and we dismiss it accordingly.

The appellants' counsel argued ground two in the alternative in the event that we found that the appellants assaulted the deceased and caused their deaths. Mr. Ngulube implored us to take into account the fact that this was a cultural practice in North-Western Province called *kikondo* during which chaos reigned, and mob justice was meted out on the deceased persons in those circumstances.

Ground three of the appeal on the other hand, assigns error on the part of the trial court in sentencing the appellants to life imprisonment because these sentences were, in the view of the appellant, excessive. We believe that the issues raised in grounds two and three are integrally linked. We shall therefore, consider the two grounds compositely.

Counsel argued, under ground two, that in circumstances such as those involving *kikondo,* those persons who participate actively and directly in the commission of any crime must take the blame. Not everyone in the crowd, according to the learned counsel, can be

liable to the same extent and, indeed, some of the guilty parties in fact get away with it and their crimes go unpunished. Our attention was called to the case of **Kashenda Njunga and Others v. The People**[7] where five accused persons were charged with manslaughter and convicted following a trial. The evidence that emerged at the trial was that the accused persons in that case had been investigating an allegation of witchcraft against the deceased and another woman. The deceased was together with other persons taken into the bush and thoroughly beaten. It was established that one of the appellants assaulted the deceased in the chest. We upheld the conviction for manslaughter and not murder. Counsel also referred to the cases of **Francis Mayaba v. The People**[8] and **Ernest Mwaba and Others v. The People**[9]. In each of these cases a death resulted from a mob assault and we held that a conviction for manslaughter in either case was appropriate. Counsel contended that in the present case the trial court should have, at the most, found the appellants guilty of manslaughter only.

In responding to the appellants' arguments under ground two, the respondent's learned counsel submitted that the trial court

cannot be faulted as the evidence before her showed that the assailants of the deceased persons intended to cause death or grievous bodily harm. Counsel pointed out that in reaching her conclusion, the trial judge considered the method and objects used in assaulting the deceased which led to their deaths. Therefore, the appellants knew or ought to have known that their assault of the deceased would lead to death or cause grievous bodily harm to the deceased and were thus liable for the full consequences of their actions. He cited the case of **Dickson Sembauke and Another v. The People**[10] to support this proposition. Counsel also submitted that there was evidence on record from the prosecution witnesses who testified that the people that assaulted Munanga had also stated that they would kill the 'hare' in reference to the deceased Edson Masonde which, in his view, was confirmation that the same people who killed Munanga had the intention of killing Masonde as well.

The learned Deputy Chief State Advocate also argued that it does not follow that where a mob participates in assaulting a deceased person, the participants can only be convicted of

manslaughter. She quoted a passage from the judgment in the case of **Francis Mayaba v. The People**[8] that:

> **the facts of the case do not support the conviction of murder because quite apart from the element of provocation and drunkenness negativing intent to kill, this was a case of mob instance justice...**

The learned counsel understood this passage as confirming that where it is established that an intention to kill is evident, a court can properly convict a participant in a mob assault for murder if a death results. Ms. Mumba also quoted holdings from our judgment in **Ernest Mwaba and Others v. The People**[9] that:

> **(i) where joint adventurers attack the same person then, unless one of them suddenly does something which is out of line with the common scheme and to which alone the resulting death is attributable, they will all be liable.**
>
> **(ii) where the evidence shows that each person actively participated in an assault then they were all crimines participes. The fact that other persons may have also assaulted the deceased at one stage can make no difference where the nature of the assaults was such that their cumulative effect overcame the deceased.**

We were urged to dismiss ground two of the appeal.

The argument advanced by the learned counsel for the appellant under ground three is that having regard to precedents set

by this court in previously decided cases, the sentences of life imprisonment meted out on each of the appellants was excessive. Counsel again referred us to the case of **Francis Mayaba v. The People**[8] where we agreed that 20 years imprisonment for murder under extenuating circumstances was excessive and it came to us with a sense of shock. We set aside the sentence and imposed instead a sentence of 5 years imprisonment for manslaughter. In **Mwiba Mukela v. The People**[11], we guided that in passing sentence on a convict the presence or absence of aggravating circumstances have to be taken into account. In that case the appellant took time to plan and hire an assassin to gun down the deceased whom he believed was a witchcraft practitioner. We considered, as an extenuating circumstance, the appellant's belief in witchcraft and sentenced the appellant to 30 years imprisonment.

We have paid the closest attention to the submissions of counsel on grounds two and three of the appeal. Having already found that ground one has no merit it follows that we can now deal substantively with the issues and the arguments raised in ground two as if it was not argued in the alternative.

Regarding the contention that the appellants were part only of the mob that assaulted the deceased and that not a single witness conclusively pointed to their actual role in assaulting the deceased, we are not in any doubt whatsoever that the two appellants were engaged in a joint unlawful enterprise with others within the intendment of section 22 of the Penal Code, chapter 87 of the laws of Zambia. That section reads 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 trial court, the two appellants could fairly be said to have had a common purpose with others in the assaulting party. Useful guidance is perhaps to be drawn from the judgment of Charles J, of the Court of Appeal (predecessor to this Court) in **Mutambo and 5 Others v. The People**[12] where he stated that:

> **[t]he 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 in the prosecution of a purpose which is common to him**

and the others, and each does so with the intention of participating in the prosecution with the other or others.

We are satisfied that in the present case, the design of the two appellants, together with the others in the group, was to harm the deceased persons who had been identified as witches responsible for the death of the late Kabinga. Even if it could be inferred that they did not actively participate in assaulting the deceased, they actively assisted the assailants and in accordance with the dictum in the case of **London Chisulo and 2 Others v. R**[13] they are guilty of the offence for which they were charged as they did not disassociate themselves from the malefactions of the rest of the assaulting mob. As long as it was established that they were part of the gang that assaulted the two deceased persons, the precise extent of their contribution individually, to the death of the deceased, was in those circumstances largely irrelevant in determining their guilt.

We agree with the submissions of the learned counsel for the respondent that the design of the cadre of villagers who believed that the two deceased persons had caused the death of the late Kabinga was to mete out reprisals and thus pay the two deceased persons

back for their perceived witchcraft practices that allegedly caused Kabinga's death, in a way that they believed was authorized by their custom and the local community.

In regard to the issue of the relationship of the witnesses to the deceased, we agree with Mr. Ngulube that there was, indeed, indisputable consanguinity between the witnesses and the deceased persons. We note in this respect that PW1 was the son of the deceased Edson Masonde while PW2 was the younger sister of the deceased Pardon Munanga. PW3 was the grandson of the deceased Pardon Munanga while PW4 was his young brother and cousin to the deceased Edson Masonde.

The learned counsel for the appellants quoted our judgment in **Kambarage Mpundu Kaunda v. The People**[3] where we guided that as relatives and friends of the deceased may be witnesses with an interest to serve, it was incumbent upon a court considering evidence from such witnesses to warn itself against the dangers of false implication, and that the court must go further and exclude such danger. In the earlier case of **Boniface Chanda Chola v. The People**[14] we

pointed out that the evidence of witnesses with an interest of their own to serve falls to be approached on the same footing as for accomplices and, therefore, requires corroboration.

We have made it quite plain in decisions subsequent to **Kambarage**[3] that our guidance in the **Kambarage**[3] case is not without qualification. In **Yokoniya Mwale v. The People**[15] we stated that:

> **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.**

In the later appeal of **Guardic Kameya Kavwana v. The People**[16], 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 enough to rule out any element of falsehood or bias.**

The lower court in the present case made, in our view, a proper assessment of the evidence of the prosecution witnesses and found that it was sufficiently cogent to support the convictions. That evidence did not require corroboration in the way we envisaged it in

the **Kambarage**[3] case. We have no reason therefore to disturb the finding of the court in this regard.

Turning now to the sentence meted out on the appellants, we note that indeed, there is a long list of case authorities in which we have held that a belief in witchcraft is an extenuating circumstance. These include **Kashenda Njunga and Others v. The People**[7], **Patrick Mumba and Others v. The People**[17] and **Jack Chanda and Kennedy Chanda v. The People**[18]. In the latter case we stated that a failed defence of provocation, where there is evidence of witchcraft accusations, could amount to an extenuating circumstance. We have however, for good cause, not been consistent on the length of the term of imprisonment we have imposed. For example, in **Chishimba v. The People**[19] the deceased, who was suspected to be a witchcraft practitioner was called out of his house by the appellant and severely beaten. He died from the severe injuries he sustained from the beating. We imposed a sentence of 10 years in lieu of death.

In **Patrick Mumba and Others v. The People**[17], we confirmed the sentence of the 1st and 2nd appellants of 20 years imprisonment with

hard labour and for the rest, the sentences of 15 years imprisonment with hard labour on account of their belief in witchcraft as an extenuating circumstance. In that case, as in the present, the appellants jointly and whilst acting together with other persons unknown, murdered a suspected witch [at Samfya in Luapula Province]. They were convicted of murder by the High Court.

In **Mbomena Moola v. The People**[20], the appellant was convicted on one count of murder. He caused the death of Kaumpe Moola of Kaumpe Village in Kaoma in November, 1994. The High Court sentenced him to death. On appeal, we agreed with the appellant that a belief in witchcraft, though unreasonable, was prevalent in our community and that such a belief is an extenuating factor. We set aside the death sentence and in its place imposed a sentence of 15 years imprisonment with hard labour. In **Nelson Bwalya v. The People**[21] we equally disturbed the sentence of death and imposed one of 15 years imprisonment on the basis of an extenuating circumstance, namely a belief in witchcraft.

P. 1236

More recently in **Mwiba Mukela v. The People**[11], to which we have already referred, we explained why a uniform term of imprisonment cannot be imposed even if a belief in witchcraft is accepted as an extenuating factor. That case, as we have already pointed out, involved the shooting of a suspected wizard by a hired gun man, the High Court, upon finding the appellant guilty of murder sentenced him to death. On appeal, we substituted the death sentence with 30 years imprisonment with hard labour. We stated, among other things, the following:

> **In passing sentence, however, we cannot ignore the aggravating circumstances in this case. The appellant took time to plan and lure an assassin to gun down the deceased, whom he believed was a wizard. The belief in witchcraft, notwithstanding, we take the view that the circumstances of this case, take it out of the realm of the other cases we have dealt with previously.**

We must also, however, point out that although the belief in witchcraft has had considerable *prima facie* attraction as mitigatory in murder cases, we have in some instances rejected the plea. Thus, in **Steak Chibale v. The People**[22], we upheld the lower court's rejection of a plea of belief in witchcraft as an extenuating circumstance. In that case, the deceased was stabbed with a spear and axed to death

by the appellant, his own child. The appellant claimed that he believed the deceased was a witch and that he had dreamt that the deceased was attempting to kill him.

It is undeniable that a belief in witchcraft has been deeply entrenched in the Zambian psyche. Perceived witches have in many of our communities been treated with untold mob violence and rough justice. Many of those accused of witchcraft have been ostracised by their families and communities; subjected to life threatening assaults; dehumanized; have had their property destroyed and in extreme cases, brutally murdered, as was the case with the deceased Pardon Munanga and Edson Masonde in this appeal. Startling accounts of harassment, persecution, starvation, abandonment and death of people suspected to be witches have also been documented. To be labelled a witch is, in many instances, tantamount to being declared liable to be killed – with impunity. Accusations of witchcraft frequently lead people, especially elderly men and women, to forced displacement or voluntary migration from their ancestral villages. In

fact, it is increasingly beginning to appear as if old age is synonymous with being a witch in many communities in Zambia.

Although, as we have sought to show, we have in a plethora of cases before us held that a belief in witchcraft is an extenuating circumstance in a murder charge, we are in no doubt whatsoever that accusations of witchcraft also present a very unsettling example of a lesser – known form of violence and discrimination, to which elderly people, especially, in our communities are subjected to daily. Witch 'trials' and the persecution and stigmatisation of people, particularly older citizens, on preposterous charges of involvement in witchcraft, even on the slimmest of evidence, is predicated on the widespread belief in witchcraft.

We think that this is a very unsatisfactory state of affairs to allow to continue unabated and yet, we are bound by the position that we have consistently espoused, namely, that a belief in witchcraft is an extenuating circumstance. This remains so unless we can depart from those precedents without appearing to lose faith in the doctrines of *stare decisis* and judicial precedents which are intended to ensure certainty and stability in the decisions of courts.

As the apex appeal court, we are obliged to stand by our past decisions even if they are erroneous (see **Abel Banda v. The People**[23]). Article 125(3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 provides that:

> **The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence.**

The framers of our Constitution, in the fullness of their wisdom, were no doubt alive to the fact that strict adherence to previous judicial decisions could, in some cases, undermine justice, asphyxiate the development of jurisprudence and perpetrate injustice. In England the realization of this position led the House of Lords to issue the **Practice Statement**[24] by which it stated that the House of Lords could overrule or depart from its own previous decisions. Lord Gardiner on behalf of the Court, stated among other things, as follows:

> **Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts settlements of property and fiscal arrangements have been**

> **entered into and also the special need for certainty as to the criminal law...**

We adopted that **Practice Statement**[24] in this country. It thus applies to this court as it applies to the apex court of England. In **Paton v. Attorney General**[25] we stated that:

> **The relaxation of the rule [not to depart from previous decision] is not abandonment and ordinarily the rule of stare decisis should be followed. Abandonment of the rule would make the law an abyss of uncertainty.**

We reiterated this position in **Match Corporation Limited v. Development Bank of Zambia and Attorney General**[26] when we stated as follows:

> **The Supreme Court being the final court of appeal in Zambia adopts the Practice Statement of the House of Lords concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly, if so, whether there is sufficiently good reason to decline to follow it.**

The broad policy question we have to answer as we deal with the appeal against the sentence imposed on the appellants in the present case is whether it is now appropriate to qualify or depart altogether from the numerous precedents that we have set regarding the belief in witchcraft being an extenuating circumstance.

P. 1241

To us, the validity of witchcraft beliefs is not in issue. There is overwhelming acknowledgement from all strata of the Zambian society that witchcraft is real, for those who believe in it, and in our view, there is no use pretending that belief in witchcraft does not exist, nor is there any useful purpose served in seeking some neutral ground in a society where people generally believe in witchcraft. This belief is in fact held by both the educated and the uneducated; the wealthy and the poor; and the old and the young. And the belief in witchcraft *per se* is not necessarily problematic; it is the actions taken in consequence of that belief which are. These, as we have pointed out already, violate a whole range of human rights including the right to life, liberty and security; the right to privacy; the right to hold property and in some cases the prohibition against torture. These are all rights recognized in the bill of rights of our Constitution, chapter 1 of the laws of Zambia. And if we take the liberty to veer into the international human rights arena, we would immediately note that social ostracism resulting from accusations of witchcraft also violates the International Covenant on Civil and Political Rights

which Zambia has ratified. That covenant protects against "arbitrary or unlawful interference with an individual's privacy, family, home and correspondence and against unlawful attacks on an individual's honour and reputation."

Still at the International human rights scene, we might add that the United Nations Committee on the Rights of the Child has called for protective measures to prevent witchcraft accusations against children in some countries, while its counterpart, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), equally categorises witch-hunts as a form of violence against women and has urged States to take action on witchcraft accusations.

The CEDAW Committee has recommended, among other things, for states to "challenge traditional views" about older women and witchcraft, requiring that states investigate the torture and killing of suspected witches and prosecute perpetrators. Our view is that these concerns set out under international human rights instruments to

which Zambia has subscribed, apply equally to men as they do to women and children.

Besides implicating human rights in the way we have described it above, a belief in witchcraft also has its own challenges at the level of domestic criminal law itself. We have in Zambia the Witchcraft Act, chapter 90 of the laws of Zambia, a relic of the British colonial era, dating back to 1914. Indeed, the preamble to the Act is quite categorical as to the purpose of the Act. It is to:

> **provide penalties for the practice of witchcraft: and to provide for matters incidental to or connected therewith.**

This Act, though it is not always enforced, makes practicing witchcraft a criminal offence. Yet, the Act goes further than merely criminalizing the practice of witchcraft. It also makes it an offence to accuse someone of witchcraft or to represent oneself to be a witch. Section 3 provides that:

> **(a) Whoever –**
>
> **names or indicates or accuses or threatens to accuse any person as being a wizard or witch; or**

(b) imputes to any person the use of non-natural means in causing any death, injury, damage or calamity; or

(c) asserts that any person has, by committing adultery, caused in some non-natural way, death, injury, damage or calamity;

shall be liable upon conviction to a fine not exceeding seven hundred and fifty penalty units or to imprisonment with or without hard labour for any term not exceeding one year, or to both; provided that this section shall not apply to any person who makes a report to a police officer of or above the rank of Sub-Inspector or, where there is no such police officer, to a District Secretary or an Assistant District Secretary.

Section 7 enacts that whoever employs or solicits any person

(a) to name or indicate any person as being a wizard or witch..... shall be liable upon conviction to the punishment provided in section three.

From the foregoing explanation and the statutory law position as quoted, three points of predicament present themselves to us as we reflect on the belief in witchcraft as an extenuating circumstance, so that those who breach the law based on such a belief are exempted, so to say, from suffering the full consequences of the law they have

contravened. The first is that a belief is simply what it is – a thought process which may not be inspired by any tangible evidence.

A belief in witchcraft is a difficult matter to ascertain. There can be no empirical evidence to determine a belief. Unlike other mitigatory factors such as drunkenness or provocation, which can easily be ascertainable either by observance, conduct or the use of the reasonable man test, what a person says they believed in may not be easy to establish, as it is highly subjective and dependent on one's state of mind. And as Bowen LJ observed in a different context in **Edgington v. Fitzmaurice**[27], "the state of a man's mind is as much a fact as the state of his digestion..."

For a person convicted of murder to state in mitigation that he or she was driven to commit the murder by his or her belief in witchcraft – and particularly that he or she believed that the person killed was involved in witchcraft – is a claim that is hardly open to proof. The highly subjective nature of this mitigation factor calls for

maximum caution in considering it as it can easily be an escape route from the deterrent effects of the mandatory sentence for murder.

In the case of **R. v. Fabian Kinene S/O Mukye & Others**[28], objective conditions existed to found the belief in witchcraft. In that case, the accused persons appeared before a Ugandan court charged with murdering an old man in their village. Their explanation was that the victim was discovered in the middle of the night "naked, with strange objects and acting surreptitiously." The court found that the victim was caught performing an act which the accused genuinely believed to be an act of witchcraft and they killed him in the way, in the olden times, was considered proper for killing a wizard. Death was caused by the forcible insertion of unripe bananas in the deceased's bowel, through the anus. The court lowered the charge from murder to manslaughter, reasoning that acts of attempted witchcraft might constitute "grave and sudden provocation." We shall revert to that case later in this judgment.

Secondly, a belief in witchcraft is positively inconsistent with the spirit of the Witchcraft Act in the manner we have explained its provisions earlier on in this judgment. The consequences of such belief are the persecution and or murder of suspected wizards, which violate not only the criminal laws of this country but amount to multiple violation of human rights, both under our domestic Bill of Rights and under international human rights law. The belief in witchcraft and the offending conduct, premised as it is on that belief, are both illegal in themselves. There is, in our view, a wider judicial policy issue here, namely, whether the courts should, in sentencing offenders, offer respite or relief for criminal conduct which was in the first place inspired by an illegal act of belief? In other words, should the courts, well knowing that a belief in witchcraft is outlawed under the Witchcraft Act, offer as they sentence murder convicts, relief to persons on the basis that they violated another law, that is to say, they believe in witchcraft? In our view, such an approach, which has hitherto seemingly been followed in this country as a general rule, is inherently contradictory and in effect constitutes a condonation of the commission of one offence to mitigate the full penalties of another

offence. It is, to us, resoundingly preposterous that a clear illegality under one piece of legislation can be used to excuse, in part, a breach of another piece of legislation. Our considered view is that it is undesirable for the courts to continue to unqualifiedly hold a breach of the Witchcraft Act, as a mitigation for breach of section 200 of the Penal Code, or any other provision of the law for that matter.

In our estimation, the plea in murder cases that the deceased had bewitched or threatened to bewitch the accused person, should be rejected unless it is shown on the evidence that the accused person had been put in such fear of immediate danger to his own life that the defence of grave and sudden provocation could easily be available on the facts. In other words, extenuation based on a belief in witchcraft should, as a general rule, be unavailing though it could in exceptional circumstance be considered. To adopt any other approach or attitude towards cases of this nature is to encourage persons aggrieved by alleged witchcraft practices, to be a law unto themselves. In our opinion, no unlawful belief, no matter how deeply entrenched in society it may be, should serve to licence the blatant

disregard of the law in a way that poses a danger to personal peace and tranquility and the respect for individual human rights.

Thirdly, the issue of extenuating circumstances is all about the sentencing policy of the courts. There is no doubt whatsoever that one of the principle objectives of criminal law is the imposition of adequate, and proportionate sentences, commensurate with the nature and gravity of the crime and the manner in which the crime was committed. It is, of course, well-understood that in the process of sentencing offenders, courts have considerable latitude or discretion. As we have intimated, in exercising such discretion, however, courts are bound to take into account a number of principles which include proportionality, deterrence and rehabilitation. We must add that there is no straight jacket approach to sentencing convicts. What sentence would meet the ends of justice in a particular case will invariably be informed by the circumstances of that case. The courts must always keep in mind the gravity of the crime, the manner of commission of the crime, the motive for the crime, the nature and prevalence of the offence and all other attendant circumstances.

P. 1250

As we pointed out in **Mangomed Gasanalieu v. The People**[29] the approach which, in our view, ought to be employed in sentencing is that of balancing mitigating and aggravating factors when deciding on an appropriate sentence for any offence. In doing so, it should be borne in mind that the aggravating factors relate to the crime while the mitigating circumstances relate to the criminal. In balancing the aggravating factors and the mitigating circumstances, therefore, it is significant for a court to determine the objective seriousness of the offence, that is to say, the surrounding facts and the maximum penalty for the offence in question, vis-à-vis the mitigating factors, that is to say, the personal circumstances of the offender – or the subjective factors.

Turning to the case before us, the aggravating factors can be easily identified. The deceased persons were killed in the most brutal of circumstances by a mob whose frenzied hostility was generated by nothing more than a mere belief that the deceased persons possessed magical faculties by which they caused the death of the late Kabinga. They were not found with any witchcraft paraphernalia, nor were they in any manner engaged in conduct suggestive of wizardry at the

time they were lynched. The deceased persons were in consequence subjected to brutal force, barbaric and sadistic treatment, leading inevitably in to their deaths. They suffered a deliberate and systematic infliction of severe pain. The assailants were a multitude of irate villagers who, in their belief that they were carrying out a praiseworthy act, took the law into their own hands. The deceased were lonesome and defenceless. The appellants acted contrary to, not one, but two statutory laws: the Witchcraft Act and the Penal Code.

The mitigating factors on the other hand were merely that the appellants had lost a fellow villager and believed that the deceased were responsible for that death. As inhabitants of the village where the deceased lived, they had the duty to protect the village from all forms of dangerous forces that could bring misfortune, illness or even death to any member of the community.

In **Berejena v. the People**[30] we held that an appellate court may interfere with a lower court's sentence only for good cause. To constitute good cause the sentence must be wrong in law, in fact or in principle or it must be so manifestly excessive or so totally

inadequate that it induces a sense of shock, or there must be exceptional circumstances justifying interference.

Weighing the mitigating circumstances against the aggravating factors in the present case, and given all the concerns about beliefs in witchcraft as we have explained them, leaves us in no doubt that although, given the state of the law as we have been interpreting it, the judge below cannot be faulted, the sentence meted out on the appellants by the trial court was inappropriate and it comes to us with a sense of shock. We say so because the sentence had the effect of whittling down the deterrent effect of sentences for murder, considering the brutal and savage attacks that the deceased were subject to at the hands of the appellants and others.

In our view, consideration of every belief in witchcraft as an extenuating circumstance threatens the whole purpose of extenuation in the sentencing philosophy of the courts. For a belief in witchcraft to be treated as an extenuating circumstance, it ought to go further than merely someone's subjective thought process. There has to be a verifiable set of circumstances that motivate such a belief as happened in the **Fabian**[28] case.

We believe that taking into account the ghastly consequences that have been documented as resulting from the deep rooted and widely held belief in witchcraft, and considering also the three concerns we have highlighted earlier in this judgment, adherence to previous precedents on witchcraft belief as an extenuating circumstance has the effect of both encouraging and perpetuating criminality and injustice. We are convinced that it is now right to depart from those precedents. Hence, we now hold that a belief in witchcraft should reach the threshold required for provocation if it is to serve as an extenuating factor to an accused person facing a charge of murder. There is absolute need to protect victims of witchcraft accusations from unprovable allegations leading invariably to multiple violations of their rights, and in some cases death.

It is for the reasons we have given that we think that although a belief in witchcraft may in rare and appropriate circumstances still be regarded as an extenuating circumstance, it generally should not offer solace to perpetrators of violence that results in death by

allowing them to escape the ultimate sanction for proven murder – death.

It is with the foregoing reasons that we set aside the sentence of life imprisonment imposed on the appellants and in its place, impose the death sentence on both appellants.

.....
I. C. Mambilima
CHIEF JUSTICE

.....
M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

.....
G. S. Phiri
SUPREME COURT JUDGE

.....
E. N. C. Muyovwe
SUPREME COURT JUDGE

.....
Dr. M. Malila SC
SUPREME COURT JUDGE