IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT KABWE/NDOLA
(Criminal Jurisdiction)

Appeal No. 52/2022

BETWEEN:

CHIKUNTA MWANSA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba and Muzenga JJA
On 12th October, 2022 and 23rd February, 2023

For the Appellant: Mrs. S. C. Lukwesa, Acting Chief Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. G. Nyalugwe, Deputy Chief State Advocate, National Prosecutions Authority

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J U D G M E N T

MUZENGA JA delivered the Judgment of the Court.

Cases referred to:

1. **Latins Lungu v. The People – SCZ Appeal No. 35 of 2018**
2. **Kalebu Banda v. The People (1977) ZR 169**
3. **Kabala Ilunga and John Musefu v. The People (1980) ZR 10**
4. **Nsofu v. The People (1973) ZR 287 (SC)**
5. **Peter Yotamu Hamenda v. The People (1977) ZR 184**

6. **David Zulu v. The People (1977) ZR 151**
7. **Ezious Munkombwe and Others v The People – CAZ Appeal No. 7, 8, 9 of 2017**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The Appellant was sentenced to death by Lamba, J., following a conviction for murder in the High Court. He has appealed against the conviction and sentence on the basis that there exists evidence on the record which cast doubt on his guilt.

1.2 The particulars of the offence alleged that on 19th November, 2017 at Chingola in the Coperbelt Province of the Republic of Zambia he did murder Beatrice Mwila.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The prosecution called a total of six witnesses. A summary of the evidence of PW1, Loveness Namonje Chanda, was that on 18th November while at home preparing supper, she was visited by the appellant who was carrying a knife and an axe. She testified that the appellant asked her to keep the knife and the axe for him because he

had differed with his wife and that his wife wanted to use the items to attack him. She agreed to keep the items and the appellant left.

2.2 It was her testimony that after a short while, the appellant's wife (the deceased) came to her house looking for the axe and the knife. The deceased entered her house and started looking for the tools. When she found them, she told her that she was going to Lulamba Police to report the matter as she may die.

2.3 PW1 further testified that the following day, she got information that there was a dead body near her house. She rushed to the scene only to find the lifeless body of the deceased in a drainage near the gravel road. She also found the knife and axe the deceased had gotten from her at the scene. She estimated the distance from her house and the crime scene to be 100 metres whereas the distance from her house and the nearest police post was about 800 metres.

2.4 In cross-examination, PW1 stated that after leaving the axe and the knife at her place, the appellant went back to his home. She also stated that after the deceased collected the two items from her, she went to the police and that the deceased collected the knife and axe

from her place against her wishes because the appellant was not sure what the deceased would do with the items.

2.5 PW2, Precious Musonda, a daughter to the deceased aged 17 years old testified that on the material day, she saw the appellant, her stepfather, punching her mother Beatrice Mwila (deceased) on the head. She tried to separate the two and the deceased reached for a knife and an axe and stated that she was going to the police to report the appellant for attempting to kill her using the knife and the axe.

2.6 PW2 told the trial court that the appellant grabbed the knife and the axe from the deceased and took them to their neighbour's house Loveness Namonje Chanda PW1. She narrated that after a short while the deceased went to PW1's house to retrieve the items. When she retrieved the items, she left for the police. It was her further testimony that about five minutes after the deceased left for the police, the appellant followed the deceased while she remained at home.

2.7 She narrated that the appellant came back home around 20:00 hours and told her that her mother was not at the police. They waited for her to come back in vain. They also tried to call her and her phone went unanswered. That the following day, the appellant left for work

around 05:00 am and around 06:00 am PW1 came to inform her that she had found her mother dead with a phone in her hands and a knife and axe near her. She stated that she went to the scene and found out that what she had been told was true.

2.8 When cross-examined, PW2 confirmed that the deceased was the one that got hold of the axe and knife first and the appellant withdrew them from her and took them to PW1's house.

2.9 Rhoida Chanda the sister to the deceased testified as PW3. She told the trial court that on 23rd November, 2017 she went to the mortuary to identify the body of the deceased.

2.10 Constable Michael Sinzumwa testified as PW4. He told the trial court that on 18th November, 2017, he was on duty at Lulamba Police Post and that he did not receive any report of assault from deceased Beatrice Mwansa or from male Chikunta Mwansa. He told the trial court that the following day before he could knock off, he received a report from Simon Kayombo (PW5) to the effect that he had found a body of his neighbour Beatrice Mwila in a farrow just outside his home. He then went to the scene with detective sergeant Mulenga and other

officers from the Scene of Crime Department. He stated that the body was found about eight to nine hundred metres from the police post.

2.11 Under cross-examination, PW4 informed the trial court that on the material night, there was no report made by either the appellant or the deceased. He also told the court that the area where the deceased met her fate was densely populated and that there were attacks on innocent citizens from the compound.

2.12 Simon Kayombo was the prosecution's 5th witness. His testimony was to the effect that on 19th November, 2017, he woke up around 06:00 hours and found a body of a female person near his home. He went to report the matter to the police.

2.13 The 6th prosecution witness was Sergeant Prosperous Mulenga the arresting officer. He testified that on 19th November, 2017, he went to the scene of the crime to check on the report they had received of a dead body lying along the road. He stated that upon reaching there, he noticed that there were scratches and bruises on the left side of the deceased's neck and blood was coming out of her nose. He narrated that the deceased had a knife and a phone in her hand and that there was an axe near her.

2.14 It was his further testimony that the police arranged for transport and the body was taken to the mortuary and a post-mortem examination was later conducted. He stated that the post-mortem examination report indicated that the cause of death was strangulation and subdural hematoma. In summation, the report indicated that the deceased sustained bruises and scratches on the left side of the neck and chin and that blood was coming out of the nose. She sustained a broken trachea and hematoma in the muscles of the neck. He told the trial court that he investigated the matter and came to the conclusion that the appellant was the last person to be seen with the deceased. He then made up his mind to arrest him and charge him with the subject offence.

2.15 In cross-examination, PW6 told the trial court that according to his investigation, the deceased left home on 18th October, 2017 and was discovered lifeless the following day on side of a public road. He also stated that there was no point at which the deceased and the appellant were seen walking together to the Lulamba police post.

2.16 This marked the end of the prosecution case. The appellant was found with a case to answer and accordingly, he was put on his defence.

3.0 THE DEFENCE

3.1 In his defence, the appellant opted to give sworn evidence. He narrated that on the material day, he had an argument with his wife which emanated from his refusal to escort her to Kitwe to attend to a marital dispute between her late wife's younger sister and her husband. According to the appellant, he told the deceased that he could try and get leave from his work the next day but the deceased was exasperated with this and accused him of not caring as it was not his relative. He told the trial court that the deceased went on to accuse him of being promiscuous.

3.2 He narrated that the deceased then got the two weapons and charged on him threatening to injure him. The deceased threw the axe at him and it whizzed past his shoulder as he dodged it. He stated that he then held the axe in one hand and the knife in the other and they started struggling.

3.3 According to the appellant, he managed to loosen the axe from the deceased and it fell behind her back. He said she then reached for his private parts prompting him to hold her by her neck. She let go and that is when PW2 grabbed the deceased from behind and pulled her

away until they fell. He got the knife and axe and took them to the neighbour's house for safe keeping. He went back home and started watching television believing the fracas was over.

3.4 He went on to say that around 19:30 hours he noticed the house was quiet and he asked PW2 where her mother was and he was told that she had gone to the police. He told the trial court that he went after her using a route that passes by the orphanage and did not find her at the police. He stated that he inquired from officer Sinzumwa, PW4, if his wife had been there. The officer checked his records and informed the appellant that there had not been any report made yet.

3.5 He went back home and informed PW2 of his findings and they tried calling the deceased's phone but the phone went unanswered. He figured she was at one of her relative's homes and that is how they slept. The following day he set off for work on a bus to Chililabombwe very early in the morning. It was his testimony that on the way, his colleague received a call and he relayed information to him that he was needed at home. The appellant alighted from the bus and headed back to Chingola. Before he could reach home, his manager called him and informed him that he had a funeral at his home. When he got

home, he found the place arranged for a funeral and he was told his wife had passed away.

3.6 He stated that officer Sinzumwa was at the funeral where he informed others around that the appellant had been to the police to inquire if his wife had gone there. He told the trial court that he was later charged and arrested for the subject offence.

3.7 Under cross-examination, he confirmed all the evidence profiled by PW1 and PW2 but denied killing the deceased.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 After careful consideration of the evidence before her, the learned trial judge found that the appellant had a fight with the deceased on the material evening and that the appellant followed the deceased shortly after she started off for the police station and came back after a short while. The trial court further found that the appellant did not go to the police post as alleged in his defence. The court also found that the deceased was not attacked by thieves as she was found with her phone in her hands.

4.2 The court went on to observe that there was no direct evidence as to how the deceased met her fate, but the circumstantial evidence on

record was so cogent and overwhelming that it took this matter away from the realm of conjecture such that only a reasonable inference of guilt could be drawn, that indeed it was the appellant who killed the deceased and went back home. The trial court found that the appellant's story that he used another route to follow up on the deceased was a mere afterthought to cover up his deeds.

4.3 It was the trial court's further finding that the appellant having followed the deceased shortly after she left for the police had ample opportunity to commit the subject offence. Further, the trial court found that the prosecution had proved its case beyond all reasonable doubt and concluded that on the totality of the evidence on the record, the circumstantial evidence before the court was so cogent that it took the case out of the realm of conjecture, so as to lead only to an inference of guilt. The court went on to find that the appellant acted with malice aforethought when he caused the death of the deceased. Accordingly, the appellant was convicted and sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Disconsolate with the conviction, the appellant filed one ground of appeal couched as follows:

The learned trial court erred in law and fact when it convicted and sentenced the appellant to death despite there being evidence on record which cast doubt on the appellant's guilt thus warranting an acquittal.

6.0 THE APPELLANT'S ARGUMENTS

6.1 In support of the sole ground of appeal, the learned counsel for the appellant contended that the finding of the trial court that the appellant did not go to the police on the material night to enquire on the where about of the deceased was made upon a misapprehension of facts and the absence of any relevant evidence. It was contended that the prosecution failed to produce real evidence in the form of the occurrence book to prove that indeed the appellant did not go to the police post on the material day.

6.2 It was counsel's submission that in criminal cases at all times, the burden of proof is on the prosecution and failure by the police to produce the occurrence book creates doubt on the evidence of PW4.

6.3 We were referred to the case of **Latins Lungu v. The People**[1] where the Supreme Court guided that:

> **"The need for the police (prosecution) to obtain relevant evidence and avail it to the Court to avoid any prejudice to the accused (and the prosecution)**

and it must be borne in mind that justice is for all parties."

6.4 We were also refered to the case of **Kalebu Banda v. The People**[2] where the Supreme Court held *inter- alia* that:

> **"(i) Where evidence available only to the police is not placed before the court it must be assumed that, had it been produced, it would have been favourable to the accused.**
>
> **(ii) In this context available means 'obtainable' whether or not actually obtained."**

6.5 It was contended that in *casu,* the occurrence book was available to the prosecution, but not produced before the court. That the probable value that the production of the occurrence book had was that the evidence of PW4 that the appellant did not go to the police post could have met the threshold in the **Mwemwa Murono case** that is, that the State did discharge the burden of proof beyond all reasonable doubt that the appellant did not go to the police. According to counsel, the piece of evidence was very vital in this case because had it been produced, then the appellant could not have accounted for the time he was out of the house and thus proved that the appellant was in fact

killing the deceased and not walking to and from the police post and that he had a clear opportunity to attack the deceased.

6.6 It was the appellant's further submission that the facts on record are silent on whether or not the deceased had any valuables or money on her to conclude that just because the phone was not stolen then other attackers are excluded. It was contended that no one would know the exact intentions of attackers at all for one to restrict them to just stealing and also stealing of any particular items like a phone. In addition, it was contended that there is evidence on record to the effect that the area where the deceased met her fate was a dangerous area and a lot of people used to be attacked.

6.7 According to counsel, the explanation given by the appellant was reasonable and there is no corroboration evidence of the appellant's involvement in the deceased's death arising from the wrong conclusion that the appellant followed the deceased and went ahead to lie to PW2 that he did not find her at the police station as that conclusion is not supported by evidence beyond all reasonable doubt.

6.8 In conclusion, we were urged to allow the appeal and set aside the conviction and sentence and acquit the appellant.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, learned counsel argued that the trial court was on firm ground when it convicted the appellant based on the circumstantial evidence which was well founded on the basis of proof beyond all reasonable doubt as the inference of guilt was the only reasonable inference which could be drawn on the facts of this case.

7.2 It was contended that the appellant is sufficiently linked to the commission of the offence through the evidence of PW2 and PW4. It was counsel's contention that PW2 had no reason to implicate his stepfather, especially since she mentioned that their relationship was cordial. That the appellant is sufficiently linked to the commission of the offence through the evidence on the record. It was submitted that on the material night, neither the deceased nor the appellant went to the police post to lodge a complaint.

7.3 It was submitted that there was no motive on the part of PW4 to falsely implicate the appellant or give false evidence against him. It was stated that in the absence of the motive of false implication, the trial court rightly accepted the evidence of PW4. It was the State's contention that from the evidence on the record, it is clear that the

only reasonable inference that can be drawn is that of guilty. We were referred to the case of **Kabala Ilunga and John Musefu v. The People.**[3]

7.4 Further, it was contended that the appellant had ample time and opportunity to commit the offence. According to the State, the movement of the appellant on the material night the following morning, with the knowledge that the deceased had not returned home is suspect. The inference to be drawn is that the appellant left the house in pursuit of stopping the deceased from reporting him to the police on account of the threats made by the appellant to kill the deceased with the axe and knife as disclosed by the evidence of PW1 and PW2.

7.5 It was contended that the circumstance and locality of opportunity in this case adequately corroborate the commission of the offence by the appellant. On this aspect, we were referred to the case of **Nsofu v. The People**[4] where it was held that:

> **"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances and the locality of the opportunity may be such that in themselves amount to corroboration."**

7.6 Further that it is the evidence of something more or too much of an odd coincidence that the deceased was found dead after the appellant was the last person who reportedly followed her before her dead body was discovered. It was contended that the absence of the occurrence book was not fatal to the prosecution case. According to counsel, not every dereliction of duty will affect the core of the prosecution's evidence. If there is other overwhelming evidence in the prosecution's case, the court can competently convict notwithstanding the dereliction of duty. In support of this proposition, we were referred to the case of **Peter Yotamu Hamenda v. The People.**[5]

7.7 Counsel went on to submit that the non-production of the occurrence book does not go to the root of the offence and therefore no prejudice was suffered by the appellant. According to counsel, the trial judge was right in concluding that the defence did not pursue the argument further. That if they anticipated evidence of the occurrence book added value to the defence of the appellant, the appellant was at liberty to call for the evidence or should have requested for an

adjournment to allow PW6 to be recalled to tender the occurrence book for him to be cross-examined on the same.

7.8 In conclusion, it was submitted that the trial court neither misapprehended the law nor the facts of this case in arriving at its judgment. Against this backdrop, we were urged to dismiss the appeal and uphold the sentence.

8.0 THE HEARING

8.1 At the hearing of this appeal on 12th October, 2022, learned counsel for the appellant Mrs. S. C. Lukwesa informed the Court that she would rely on the filed heads of arguments and learned counsel for the respondent Ms G. Nyalugwe, informed the Court that she would equally rely on the filed arguments.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments of both counsel and the judgment under attack.

9.2 It is our considered view that this matter stands profoundly on circumstantial evidence. The legal issues pertaining to the nature and application of circumstantial evidence are very well settled in our jurisdiction. Circumstantial evidence can constitute good evidence and

often times it is the best type of evidence. Circumstantial evidence is a form of indirect evidence. Unlike direct evidence, circumstantial evidence, like other kinds of indirect evidence, does not provide direct proof of a fact in issue. Hence, it is important that this type of evidence is well examined to avoid drawing wrong inferences from it.

9.3 It must be stressed that, unlike direct evidence which requires the court to merely assess the truth and reliability of the evidence given, with circumstantial evidence the court must first assess the veracity of the evidence and then consider what inferences may be drawn from such evidence. In the case of **David Zulu v The People[6],** the Supreme Court held *inter-alia* that:

> "(i) **It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the facts in issue and from which an interference of the facts in issue may be drawn.**
>
> (ii) **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**

of cogency which can permit only an inference of guilt."

9.4 The gist of the appellant's argument on appeal is that the evidence implicating him is not cogent enough to take 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. We held in the case of **Ezious Munkombwe and Others v. The People**[7] that:

> **"When considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellant must be looked at in their totality and not individually."**

9.5 The circumstantial evidence in this case is mainly that the appellant and the deceased had a fight in the evening, in which the deceased wanted to use an axe and a knife which the appellant took to their neighbour PW1. A few minutes later the deceased turned up at PW1's house, demanded for the axe and knife, got them forcibly and took them with her, stating she was taking them to the police. Upon learning that the wife had gone to the police, the appellant followed her and returned 30 minutes later stating that he had not found her at

the police station. This was around 19:00 hours. The following day her body was found lifeless in a drainage.

9.6 Could the circumstantial evidence herein be said to permit only an inference of guilt? There is undisputable evidence on the record that the area in which the deceased was found dead is prone to attacks by criminals. Further, the appellant explained that he had gone to the police station at Lulamba to follow up on his wife and made it clear that the occurrence book would show his presence. The prosecution did not present it before court. We hold the view that the explanation given by the appellant could reasonably be true.

9.7 Further, there was nothing unusual observed when the appellant came back home, either in behaviour, appearance, soiled or torn clothing or anything else which could be considered to be consistent with someone returning from committing a violent crime. This is more especially that this case was a strangulation one, involving close proximity with the victim, who would ordinarily struggle to wade off the attack.

9.8 We hold the view that the circumstantial evidence in this case cannot permit only an inference of guilt. The deceased could have been murdered by criminals who had been terrorising residents in the area.

It has always been a cardinal principle of law that where there is more than one inference which can be drawn from the facts, one more favourable to the accused person must be drawn. Had the learned trial court properly analysed the evidence, it would no doubt have found the circumstantial evidence to be weak. We therefore set aside the finding by the trial court that the circumstantial evidence was cogent.

9.9 We find merit in the lone ground of appeal.

10.0 **CONCLUSION**

10.1 We therefore allow the appeal. The appellant's conviction and sentence is hereby set aside. We acquit the appellant and set him at liberty.

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C. F. R. MCHENGA

DEPUTY JUDGE PRESIDENT

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F. M. CHISHIMBA

COURT OF APPEAL JUDGE

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K. MUZENGA

COURT OF APPEAL JUDGE