

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 069/2020

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

FRANCIS NGOSA

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: MCHENGA, DJP, MAKUNGU AND NGULUBE, JJA.
On 10th November, 2020 and 13th November, 2020.

For the Appellant: K. Tembo, Legal Aid Counsel, Legal Aid Board

For the Respondent: J.E. Banda, State Advocate, National Prosecution Authority

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *David Zulu vs The People* (1977) Z.R.151
2. *Chibozu vs The People* (1981) Z.R.28
3. *Dorothy Mutale and Richard Phiri vs The People* (1995 - 97) Z.R. 227
4. *Saluwema vs The People* (1965) Z.R.4
5. *Saidi Banda vs The People* SCZ Selected Judgment Number 30 of 2015
6. *Bwanausi vs The People* (1976) Z.R.103,
7. *Machipisa Kombe vs The People* (2009) Z.R.282
8. *Ilunga Kabala and John Masefu vs The People* (1981) Z.R. 102



9. *Joseph Mutapa Tobo vs The People (1990 – 1992) Z.R. 140*
10. *Joseph Mulenga and Albert Joseph Phiri (2008) 2 Z.R. 1*
11. *Daddy Fichite vs The People Appeal Number 21 of 2017*

Legislation referred to:

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

INTRODUCTION

1. This is an appeal against the judgment of the High Court (Mumba, J), delivered on the 10th of January, 2019, at Ndola High Court. By that judgment, the appellant was convicted of one count of the offence of murder, contrary to section 200 of the Penal Code, Chapter 87 of the Laws of Zambia. The particulars of the offence were that the appellant, on 11th December, 2016, at Luanshya in the Luanshya District of the Copperbelt Province of the Republic of Zambia, murdered Richard Mwila. The appellant was sentenced to death because the court was of the view that there were no extenuating circumstances in the matter. The appeal is against conviction and sentence.
2. The prosecution's case was anchored on the evidence of four witnesses. Their collective evidence established the following brief facts:

EVIDENCE BEFORE THE LOWER COURT

3. On 2nd December, 2016 at night, PW1, LUCK NTOMESYA accompanied his friend Valentine(PW2) to Match Corporation in the industrial area in Luanshya, to take a motor vehicle which Valentine's customer required to use. As they approached the crossroads at ZAMEFA, PW1 saw a man dragging a person by the legs from the Road Transport and Safety Agency (RTSA) offices to the opposite side of the road. He noticed that the man who was dragging the person had no shirt on. When PW1 asked the man what was happening, he stated that he found the person near the RTSA gate and then decided to move him away from there.
4. They observed as the man dragged the person until he threw him into a nearby drainage. Upon seeing this, PW1 and his friend apprehended the man who had thrown the person into the drainage. PW1 then went to the drainage and when he took a closer look, he noticed that the person in the drainage was a man who was naked and in an unconscious state, groaning.
5. They reported the matter to Luanshya Police Station where the culprit was remanded in custody.
6. PW1 and his friend then returned to the scene with police officers who removed the man from the drainage. Upon taking a closer

look, they both noticed that the man had a swollen face with blood all over his body and bruises on his back. PW1 denied the assertion that the culprit was drunk because he interacted with him for some minutes at the scene and did not notice any drunkenness. He however noticed that the man was not wearing a shirt.

7. PW2 and his friends then took the culprit to Luanshya Police Station and reported the matter to the Police. They returned to the scene with police officers who retrieved the victim from the drainage and took him to the hospital. PW2 noticed that the man was shivering, had blood stains on his body and injuries on the upper lip and at the back of his head.
8. PW2 and the police officer then proceeded to the RTSA gate where they found a bag with torn clothes as well as torn underwear. There were also blood stains and struggle marks there. PW3, Danny Mwila, was Richard Mwila's father. He was informed that his son was admitted to Thomson Hospital on 2nd December, 2016 and when he went there, he found that his son had several injuries and was unable to talk. He later died on 11th December, 2016. On 13th December, 2016, PW3 identified his son's body to the doctor at a postmortem examination that was conducted and

noticed that his son had two deep wounds at the back of the head. The last time he saw his son, on 2nd December 2016, he was in good health.

9. PW4, Detective Sergeant Joseph Banda's testimony was that on 2nd December, 2016 at about 23:00 hours he was doing motorized night patrols with other police officers within Luanshya. He passed through Luanshya Police Station where he was stationed at the time and found a report which was to the effect that a person was beaten and dumped in a drainage somewhere in the industrial area. PW4 rushed to the scene and was led by PW1 and PW2. Upon getting there, with the help of other police officers, he retrieved Richard Mwila from the drainage and noticed that he was naked with a cut on the head, the upper lip and several wounds on the back. PW4 followed a trail of blood from the drainage which led him to the RTSA gate, a distance of about one hundred metres where PW4 saw some blood stains and struggle marks.
10. PW4 took Richard Mwila to the hospital where he died a few days later. He attended a postmortem examination that was conducted by Dr Mubukayi, whose findings were that the deceased died of subdural hematoma. PW4 later charged and arrested the appellant,

for the offence of murder. Under warn and caution, he denied the charge.

11. The appellant gave evidence on oath in his defence, stating that on 2nd December, 2016, he was on night duty at RTSA where he was a guard and as he conducted patrols at about 23:00 hours, he found the deceased lying near the gate. He decided to pull him away because he feared that he would be run over by a motor vehicle. As he pulled him away, a motor vehicle drove past and then stopped. The men who were in the vehicle asked him what was happening and he explained that he found the injured man outside the RTSA gate and decided to pull him away for his own safety.
12. The appellant eventually went to the police station with the men in the motor vehicle, where he was detained as Police suspected that he knew something about the injured man. He denied having fought with the deceased and stated that, he only moved him away from the gate for his safety. The appellant denied throwing the man into the ditch. He stated that he left him at the road side under the care of people who were in the motor vehicle. The appellant stated that the man he pulled away from the RTSA gate was drunk.

DECISION OF THE LOWER COURT

13. Upon analyzing the evidence before it, the court was of the view that the appellant's explanation that he pulled the deceased away so that he would not be run over by a motor vehicle was unreasonable because of the manner in which the appellant conducted himself. The court found that the appellant's defence was an afterthought as he did not report the matter to the police after allegedly finding the deceased at the gate. The court further accepted the evidence of PW1 and PW2 that they found the deceased in a ditch with physical injuries on his body. The court found that the circumstantial evidence and the odd coincidences pointed at the appellant as the person who inflicted injuries on the deceased and that the odd coincidences such as the fact that the appellant was found not wearing a shirt provided something more. According to the court, the manner in which the appellant treated the deceased showed that he had the intention to cause his death. He was accordingly convicted of the offence of murder and the court did not find any extenuating circumstances thus sentencing the appellant to death.

THE APPEAL

14. At the hearing of the appeal, learned Counsel for the appellant Mr Tembo, relied on the sole ground of appeal and the heads of

argument filed herein on 4th November, 2020. The sole ground of appeal is restated –

“The lower court erred in law and fact when it convicted the appellant based on circumstantial evidence when an inference of guilt was not the only one which could reasonably be drawn from the facts.”

THE APPELLANT’S ARGUMENTS

15. Counsel contends that on the totality of the evidence in this matter, the prosecution cannot be said to have established the guilt of the appellant because the circumstantial evidence does not satisfy the test set in the case of **David Zulu**¹. To fortify this argument, counsel relied on the aforementioned case of **David Zulu vs The People**¹ where the Supreme Court held among other things–

“(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 it is proof of facts not in issue but relevant to the facts in issue and from which an inference of the fact 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 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.

16. He further submitted that the court totally misapplied the principle and the law in the aforesaid case as it did not analyse how the circumstances of the case took it out of the realm of conjecture. That the effect of the injuries that caused the death was not expounded and was left hanging because the doctor who issued the postmortem report was not called to testify as to what could have caused the subdural hematoma.
17. Counsel referred us to the case of **Chibozu vs The People**² where the Supreme Court held among other things that –

“Medical reports usually require explanations not only on the terms used but also the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable for the person who carried out the examination in question and prepared the report to give verbal evidence.”

Counsel added that there is doubt as to whether the deceased's injuries or subdural hematoma was caused by being dragged on the ground or by a road accident. According to Counsel, it cannot be said that the only inference is that the appellant caused grievous bodily harm to the deceased.

18. Counsel further submitted that it is highly possible that the deceased was drunk and fell thereby injuring himself, that the

head injury was the result of him falling and hurting himself. It was argued that the people who rescued him from the drainage could have dropped him as they tried to put him in the police vehicle or that he and the appellant had fought. He referred us to the case of ***Dorothy Mutale and Richard Phiri vs The People***³ where the court held that-

“(i) Where there are two or more inferences to be drawn, the court should adopt the inference favourable to the accused person if there is nothing to exclude that inference.”

In light of the above-mentioned case, he urged us to find that there is nothing from the record to suggest that other factors that caused subdural hematoma had been ruled out.

19. Counsel went on to refer to the case of ***Saluwema vs The People***⁴ where the court held that -

“If the accused's case is reasonably probable then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.”

Counsel submitted that although the appellant denied having fought with the deceased, it is possible that they fought, as the court stated that there were some struggle marks at the RTSA gate which can indicate that there was a fight. According to Counsel,

considering that the appellant was found without a shirt on and that the deceased's clothes were recovered in a torn state, which are typical attributes of a fight, the proper conviction would have been for the offence of manslaughter or murder with extenuating circumstances as there is evidence that there was a struggle. We were urged to uphold the appeal and set the appellant at liberty.

THE RESPONDENT'S ARGUMENTS

20. In response, learned Counsel for the respondent, Ms Banda submitted that a guilty inference was the only inference that could reasonably be drawn from the facts. To buttress her position, she referred to the case of **Saidi Banda vs The People**⁵ where the court stated that –

“The law with respect to circumstantial evidence has been restated many times by this court and it is that, in order to convict based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the accused’s guilt.”

21. Referring to the case of **Bwanausi vs The People**⁶, where it was held that –

“Where a conclusion is based purely on inference, that inference may be drawn if it is the only reasonable inference on the evidence.”

Counsel submitted that there is compelling circumstantial evidence on record removed the case out of the realm of conjecture and led to an inference of the appellant's guilt.

22. Ms Banda further submitted that the appellant was seen shirtless by PW1 and PW2 as he dragged the deceased with his head rolling on the ground until he threw him into a drainage that was one metre deep. That the deceased who was dumped in the ditch was found naked, bloody with several injuries and unconscious. Counsel contends that it was odd and circumstantial for the appellant to have been found dragging the deceased in that manner.
23. It is argued that the appellant's behaviour on being asked why he did not report the matter to the Police, was odd, as he stated that the Police would have apprehended him for being responsible for the injuries of the man that he dragged and dumped in the drainage.
24. According to Counsel, it is odd that torn underwear, torn clothes and blood stains were found near the RTSA gate where struggle marks were also found. That a trail of blood from the drainage

where the deceased was found to the RTSA gate covering a distance of about one hundred metres was also seen. According to Counsel, the only inference that can be drawn from all these circumstances, is that it is the appellant who inflicted the injuries found on the deceased.

25. Counsel referred us to the case of *Machipisa Kombe vs The People*⁷ where the court held that –

“Odd coincidences constitute evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account.”

It was further submitted that the appellant was unable to explain why he dragged the deceased from the RTSA gate all the way across the road and that the explanation that it was to protect him from vehicles that turn near the gate cannot reasonably be true.

26. The court was referred to the case of *Ilunga Kabala and John Masefu vs The People*⁸ where the Supreme Court held that –

“It is trite law that odd coincidences if unexplained may be supporting evidence. An explanation which cannot reasonably be true in this connection is no explanation.”

27. On the argument that the doctor who conducted the postmortem was not called as a witness to testify as to what kind of injuries caused the subdural hematoma, it is submitted that a

pathologists can make logical inferences from observations they make. In this regard, the court was referred to the case of **Joseph Mutapa Tobo vs The People**⁹ where the court stated that –

“We wholly agree with the commissioner that the real value of the evidence of a medical expert consists in the logical inferences which he draws from what he has himself observed.”

According to Counsel, PW4 who produced and tendered the postmortem report was not cross-examined on it and no request to call the pathologist was made. That the cause of death was clear and understood by both parties and was admitted into evidence without any objection.

28. Counsel referred to the case of **Joseph Mulenga and Albert Joseph Phiri**¹⁰ where the Supreme Court held that –

“During trial, parties have the opportunity to challenge evidence by cross examining witnesses. Cross-examination must be done on every material particular in the case. When prosecution witnesses are narrating actual occurrences, the accused must challenge these facts which are disputed.”

Counsel further referred to the case of **Daddy Fichite vs The People**¹¹ where the Supreme Court concluded that-

“Since the defence did not raise any objections or challenge the medical evidence during the trial, the result is that there being no reason to hold otherwise, we agree with the doctor's expert opinion.”

Counsel went on to state the summary of significant findings, are that the deceased was found with several wounds on the back and the head in addition to hemorrhagic marks on the skull and inner side of the scalp.

29. According to Counsel, these were consistent with the dragging and throwing of the deceased into the drainage by the appellant. That it is highly improbable that the deceased could have sustained the injuries by drunkenness and falling, or that he was dropped by the people who rescued him as they tried to put him in the Police vehicle or by the deceased fighting with the appellant.
30. She submitted that the injuries alluded to are indicative that there was an intention to cause the death of the deceased or cause him grievous harm and that as a result, malice aforethought was established. It is further submitted that there are no extenuating circumstances disclosed on the record, more so that the appellant did not raise any defence. This court was urged to uphold the conviction and sentence of the lower court and that the appeal be dismissed for lack of merit.

DECISION OF THIS COURT

31. We have considered the record of appeal and the arguments advanced on behalf of both parties. The real question as we see it is whether the circumstantial evidence took the case out of the realm of conjecture such that it attained a level of cogency that could allow only an inference that the appellant is guilty. Even though the prosecution witnesses are not on record as having stated what was used to injure the deceased and who attacked him that night, it is not in dispute that the deceased had injuries on the face and on parts of the head.
32. It was argued that the learned trial court misapplied the principle and the law relating to how circumstantial evidence should be treated as espoused in the case of **David Zulu vs The People (supra)**. We do not agree with this submission for the following reasons: Firstly, the evidence of PW1 and PW2 is that they found the appellant dragging the deceased whom he later threw into a drainage. Secondly, the deceased was found naked, bloody and with injuries on his body. Thirdly, there was a trail of blood from the drainage where the man was dumped up to the RTSA gate, where the appellant worked, with some struggle marks seen at the

gate. The nature of the undisputed facts is that there is no question that the deceased died of unnatural causes.

33. In any event, the learned trial Judge analysed the eye witness evidence with great caution and gave reasons why he believed their evidence as being truthful, credible, free from concoction and without false implications. In our view, the cautious approach by the learned trial Judge in his analysis of the circumstantial evidence and the odd coincidences in the matter left him with no option but to conclude that the appellant did not act in a manner tending to the preservation of the life or health of the deceased. The court was of the view that the appellant, as an alert security guard would have reported the matter to the police but did not do so.
34. The court referred to the doctor's findings in the postmortem report that the body of the deceased was found with severe wounds on the back and the head. This is what provided the basis for the learned trial Judge to conclude that the circumstantial evidence had taken the case out of the realm of conjecture leading to the only conclusion that it is the appellant who caused the deceased's death. We do not find any basis upon which we can interfere with that finding of fact.

35. We are further of the view that the trial court had before it sufficient evidence from which to conclude that the appellant caused the death of the deceased and that he acted with malice aforethought, having regard to the severe injuries that the deceased suffered, as per the postmortem report. In any case, the appellant did not object to the production of the postmortem report and all the other evidence during the trial. We do not agree with the argument that the prosecution should have called the doctor who conducted the postmortem for him to testify on the cause of death as the same was clear from the evidence on record.
36. The circumstances of the present case were rather sad indeed. The appellant decided to dump the deceased in the drainage so that he could die there after inflicting serious injuries on him.
37. In the present case, we do not find that two or more possible inferences could be drawn on the circumstances leading to the death. The test presented in the Dorothy Mutale case has been satisfied and therefore the lower court was on firm ground when it convicted the appellant as charged.

CONCLUSION

38. In summary, the appellant beat up the deceased for reasons only known to him and he then dragged him and dumped him in the

drainage so that he could die there. He died a few days later in hospital. We do not find any extenuating circumstances in this matter. The net result is that this appeal fails in its entirety and we uphold the conviction and sentence.


Dated at Ndola this 13th day of November, 2020.



C.R.F MCHENGA
**DEPUTY JUDGE PRESIDENT
COURT OF APPEAL**



C.K MAKUNGU
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE