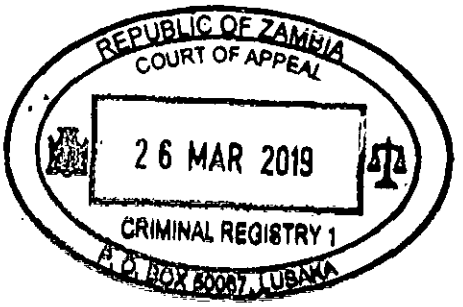
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 115/2018**
HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

BETWEEN:



TEMBO LUNGU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***Makungu, Sichinga and Ngulube, J.J.A***
On the 22nd January and 26th March, 2019

For the Appellant: *Ms. S.C Lukwesa – Senior Legal Aid Counsel – Legal Aid Board*

Respondent: *Mrs. M. Chipanta - Mwansa - Deputy Chief State Advocate National Prosecutions Authority*

J U D G M E N T

Sichinga, JA delivered the Judgment of the Court

Cases referred to:

1. *Joseph Mulenga and another v. The People (2008) Vol. 2 ZR 1 (SC)*
2. *Ilunga Kabala and John Masefu v. The People (1981) ZR 102 (SC)*
3. *David Zulu v. The People (1977) ZR 151 (SC)*
4. *Patrick Sakala v. The People (1980) ZR 205 (SC)*
5. *Dorothy Mutale and Richard Phiri v. The People (1997) SJ 51 (SC)*
6. *Sondo v. The People (1981) ZR 302 (SC)*

7. *Tembo v. The People (1972) ZR 220 (SC)*
8. *Director of Public Prosecutions v. Ngandu and others (1975) ZR 253*
9. *Kalebu Banda v. The People (1977) ZR (SC)*

Legislation referred to :

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

Tembo Lungu, the appellant herein appeared before the High Court sitting at Chipata charged with one count of the offence of murder contrary to **Section 200** of the **Penal Code**. The particulars of the alleged offence were that on 29th July, 2016 at Mpandwe Village in Nyimba District of the Eastern Province of the Republic of Zambia, the appellant murdered Peter Phiri. He denied the charge and the matter proceeded to trial.

The crucial facts were that on 28th July, 2016 around 20:00 hours the appellant had been gambling in a game of cards with six other men including Frank Sangu Mwanza, PW1; Oscar Mumba ,PW2; White Mumba, PW3; Anderson Lungu and Bry Phiri the deceased. The evidence of PW1, the host of the gambling, was that on this particular evening, the appellant wore black and red boots. PW2 equally testified that he observed the appellant wearing black and

red boots which had red studs at the bottom. Under cross-examination, PW2 said that he had not mentioned the boots to the police when he gave his statement.

White Mumba (PW3) who was in attendance at PW1's house playing cards, told the court that he left PW1's house around 03:00 hours leaving the appellant, Victor and the deceased.

Aaron Phiri, PW4's evidence was that on 29th July, 2016 around 07:00 hours, he learned that his brother's body had been found along Mpundwe stream at Mutausi Village. He went to the scene where he observed bicycle tracks and football boot imprints leading to Shola village. PW4 also observed blood on the deceased's head.

Bernard Tembo, PW5 who was also the deceased's brother, confirmed seeing bicycle tracks and football boot imprints at the scene.

Detective Inspector Mackinon's evidence was that on 29th July, 2016, he received a report from Bernard Tembo that his brother had been found murdered near Mpundwe stream. He visited the

scene and discovered a stick a meter away from the body of the deceased. Detective Inspector Mackinon also observed football boot imprints. On 31st July, 2016, he attended the post-mortem examination on the deceased's body conducted by Dr. Kabaku. He then learned that the deceased died as a result of head injuries. Detective Inspector Mackinon also told the court that he was informed by Grevesio Mumba that he left the deceased in the company of the appellant and Victor. He said he was unable to find Victor. In cross examination, Detective Inspector Mackinon told the Court that there was no connection between P1, the football boots and the prints found near the body of the deceased. He further told the court that many people in Shola village owned soccer boots.

In his defence, the appellant denied being present when the other men were playing cards on the material day. He said PW1, PW2 and PW3 had fabricated the story about him gambling on 28th July, 2016. He was facing the charge because he failed to pay the bribe that was demanded of him by the police in the sum of K2, 000.00. He however said he enjoyed a cordial relationship with the witnesses that had implicated him in the murder.

After considering all the evidence before her, the learned trial Judge found that the case against the appellant was premised on circumstantial evidence. She found that the evidence of Frank Sangu Mwanza (PW1), Oscar Mumba (PW2) and White Mumba (PW3) was not challenged in cross – examination with regard to the appellant's presence at PW1's house on the night in question. She found as a fact that the accused was present on the material night and his denial was an afterthought because the appellant had the opportunity to challenge the prosecution evidence in cross-examination but he did not. The case of ***Joseph Mulenga and another v. The People***[1] was referred to. The lower court further found that it was evident that the appellant had engaged in gambling with the witnesses and the deceased during the night of 28th July, 2016, and that he wore soccer boots on the material day. The learned trial Judge accepted the testimony of PW1, PW2 and PW3 that the appellant knew them and enjoyed cordial relationships with them.

The learned trial Judge also found it an odd coincidence that the appellant wore soccer boots on the material night and that football

boot prints were found at the crime scene. She drew guidance from the case of ***Ilunga Kabala and John Masefu v. The People***[2] wherein the Supreme Court held *inter alia* that an unexplained odd coincidence maybe supporting evidence where no reasonable explanation has been given for the coincidences.

On the totality of the evidence before her, the learned trial Judge found that the circumstantial evidence had taken the case out of the realm of conjecture to permit only an inference of guilt. She found the appellant guilty of the charge of murder and convicted him. She found no extenuating circumstances present in the case and imposed the capital penalty on the appellant.

Dissatisfied with the Judgment of the lower court, the appellant appealed against conviction and sentence, and raised two grounds of appeal as follows:

1. **The learned trial Court erred in law and in fact when it convicted the appellant for the offence of murder in the absence of cogent circumstantial evidence.**

2. **The trial court misdirected itself in law and in fact when it held that there were odd coincidences which were supporting evidence that led to a finding of the appellant's guilt when in fact no odd coincidences existed to undoubtedly warrant the conviction of the appellant.**

Heads of argument were filed on behalf of the appellant and the respondent on 22nd January, 2019.

In ground 1, Ms. Lukwesa, learned senior legal aid advocate, on behalf of the appellant submits that the prosecution did not adduce evidence to prove all material particulars of the offence beyond reasonable doubt. She pointed out that the circumstantial evidence in *casu* lies in the fact that the appellant allegedly made the boot prints found around the deceased on the material day. Ms. Lukwesa referred to the case of ***David Zulu v. The People***[3] and submitted that the circumstantial evidence that it was the appellant's boot prints found at the murder scene and thus he caused the deceased's death and further that he was the last person to be seen with the deceased so as to draw an inference of guilt are too far – fetched. She argued that there is

no evidence on record that the appellant left together with the deceased in the same direction on the material night or that the deceased and the appellant had an altercation whilst playing cards or any time later before they parted.

Further, it is submitted that the evidence of the arresting officer (PW7) to the effect that the boot prints found at the murder scene led to Mutausi farm was contrary to PW4's assertion that they led to Shola village. That even if it is believed that the boot prints led to Shola village, it was the same village where PW1 lived and not the appellant.

We were also invited to note that one of the persons said to have been with the deceased called Victor, was nowhere to be found after the deceased was discovered dead, despite several attempts by PW7 to locate his whereabouts. It is submitted that the possibility that Victor murdered the deceased and ran away was plausible since he was not found and PW7 opted to take the easy way out by charging the appellant.

Ms. Lukwesa pointed out that neither PW1 nor PW2 could remember or give a description of the shoes the other men wore on the material day. Further, that it was peculiar that Detective Inspector Mackinon deliberately not inquired from PW2 about the shoes because at the time of interviewing witnesses, the police already had information of the boot prints found at the crime scene. Counsel submitted the only logical explanation was that PW2 did not tell the police about the description of the shoes worn by the appellant on the material day because he could not even recall the clothes that each man wore. PW3 also made no mention of the boots or description of the clothes. We are requested to note that he was also apprehended in connection with the offence and held in police custody for seven days.

With respect to Aaron Phiri (PW4) and Bernard Tembo (PW5), the deceased's brothers, they testified to having observed foot prints and not boot prints at the crime scene. It is submitted that there was no clear distinction of what they saw.

On the evidence of Derrick Mawere, PW5, an accountant in the Company the deceased worked for, who testified that the

deceased was paid the sum of K1, 376.00 on 25th July, 2016, it is submitted that the state endeavored to create a motive for the killer to have been after the deceased's money. However, there was no evidence linking that money to the appellant.

Learned counsel further submitted that Detective Inspector Mackinon testified that a lot of people in Mutausi and Shola villages played football and owned foot boots. It is submitted that there was no correlation between the football boot prints found at the scene and the appellant's boots - P1. Ms. Lukwesa referred us to the case of ***Patrick Sakala v. The People***[4] wherein the Supreme Court stated that circumstantial evidence should be so cogent and compelling that no rational hypothesis other than murder could the facts in the case be accounted for. Learned counsel questioned whether the evidence in *casu* was cogent and compelling that no rational hypothesis other than murder could the facts in the case be accounted for. Whether the evidence had taken the case outside the realm of conjecture so that it attained a degree of cogency which could permit only an inference of guilt. It is submitted that the answer is in the

negative as there were a number of inferences which could reasonably be drawn from the evidence. Firstly, that any other person that owned boots in either of the villages of concern could have killed the deceased. Secondly, that it could have been Victor who had killed the deceased then ran away. And thirdly it could have been the appellant who killed the deceased.

Ms. Lukwesa submitted that the inference which is favourable to the appellant is that he is not the one that killed the deceased because where two or more inferences can be drawn doubt is cast by the existence of other inferences. The case of ***Dorothy Mutale and Richard Phiri v. The People***[5] refers.

It is submitted that it cannot be said with certainty that the circumstantial evidence in *casu* took the case out of the realm of conjecture so that it attained such a degree of cogency which permitted only an inference of guilt. We were urged to allow ground one.

In ground two, Ms. Lukwesa submitted that the learned trial Judge relied heavily on purported unexplained odd coincidences. That it was an odd coincidence that the appellant was wearing

football boots on the material day and soccer boot prints were found at the crime scene. Further, that the appellant was the last person seen with the deceased. Learned counsel contends that the evidence of prints found at the scene range from being foot prints to football boots prints. There was no description of the boots worn by the appellant to the arresting officer by any of the witnesses interviewed. In addition, there was no link between P1 produced in court and the prints found at the crime scene. It is submitted that the result of the unclear and delinked evidence of boot prints cannot be called an odd coincidence. However, it is simply evidence that exonerates the appellant.

Ms. Lukwesa further argued that the appellant was not the last person to be seen with the deceased, as there was Victor who was also seen with the deceased and the appellant. No one saw the appellant and the deceased leaving PW1's place together or walking with the deceased. Learned counsel submitted that it was a misdirection and misapprehension of facts for the trial Court to find those facts as unexplained odd coincidences. It is submitted that on the totality of the evidence, the prosecution

did not prove the case against the appellant beyond reasonable doubt.

In her oral submissions, Ms. Lukwesa addressed the issue raised in the respondent's heads of argument that the appellant lied in his defence. She submitted that in instances where the court notices that an appellant has told a lie, what is of relevance is the totality of the evidence. Counsel relied on the case of ***Sondo v. The People***[6] for this proposition. We are thus urged to allow ground two.

In response to the appellant's written submissions, the respondent also filed written submissions on 22nd January, 2019. In response to ground one, Mrs. Chipanta - Mwansa submitted that it is competent for a trial court to convict on circumstantial evidence provided that the evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can only permit an inference of guilt. The case of **David Zulu v. The People *Supra*** refers. That in *casu* the appellant was the last person seen with the deceased wearing soccer boots around 01:00 hours and a few hours later, between

06:00 hours - 07:00 hours, the deceased was found dead. Around the scene were found prints of soccer boots. When the appellant was apprehended, he was wearing soccer boots which some witnesses identified as the ones he had been wearing the previous night when he was gambling with the deceased and other witnesses.

Mrs. Chipanta – Mwansa submitted that the appellant was placed at the scene and when he was put on his defence, he failed to give a reasonable explanation. That the appellant lied when he said that he and his colleagues dispersed around 14:00 hours and not around 01:00 hours. Further, that his evidence in cross examination was full of inconsistencies which discredited him. Learned counsel referred us to the case of ***Tembo v. The People***[7] in which the Supreme Court held *inter alia* that when a witness, particularly the accused tells lies, the whole of his evidence is affected. That in the instant case the appellant's evidence was unreliable.

It is further submitted that PW1 observed that the appellant wore soccer boots because they were not ordinary boots. Even if there

were other people in the village who owned soccer boots, it was the appellant who was last seen with the deceased on the material day. It is submitted that since soccer boots are expected to be worn for playing soccer, the appellant stood out from the group and that was why PW2 was able to identify him.

From the above circumstances and the appellant having been placed at the scene of the crime, and discredited during cross-examination, it is submitted that the only inference that could be drawn is that the appellant murdered the deceased. Also that the appellant having confirmed that PW1, PW2 and PW3 had no reason to falsely implicate him, the case attained that degree of cogency and the danger of false implication had been removed making it safe to convict on the evidence on record. Counsel prayed that ground one should fail.

With regard to ground two, Mrs. Chipanta –Mwansa concurred with the trial court that there were odd coincidences and the same supported the finding of guilt. That it was an odd coincidence that the appellant was the one wearing soccer boots

and remained till around 01:00 hours, and that there were soccer boot prints found at the place where the deceased was found. On odd coincidences the case of **Ilunga Kabala and another *Supra*** was referred to.

Learned counsel submitted that in *casu* the appellant could not even give any explanation as to how soccer boot prints could be found at the scene of crime and a few hours earlier, he had been seen wearing the soccer boots with the deceased. That the appellant instead tried to merely distance himself from the crime and insisted he was charged because he failed to pay a bribe to the police.

Counsel conceded that no one saw the appellant and the deceased leaving PW1's place or walking away together. However, there was evidence which was not disputed that the appellant remained with the deceased and they were seen around 01:00 hours. The fact that Victor was not called as he went missing immediately after the incident, did not exonerate the appellant in any way. The appellant did not even claim to have

left Victor with the deceased at the scene, an indication that he knew and actually knows what happened to the deceased after he had remained with him.

It is submitted that on the authority of ***Mwenya v. The People***[8] PW1, PW2 and PW3 ought to have been considered as suspect witnesses and the court ought to have exercised circumspection when receiving their testimonies since they had initially been detained as suspects. Learned counsel submits that this notwithstanding, their evidence was corroborated when the appellant confirmed that he had enjoyed a cordial relationship with them and that they would not have a reason to falsely implicate him. Counsel prayed that this should fail too.

Mrs. Chipanta- Mwansa submitted that there was overwhelming evidence on record supporting a conviction against the appellant. She urged us to dismiss the appeal and uphold the conviction and sentence.

We have considered the evidence on record, the Judgment of the trial court and the submissions by learned counsel. We will first deal with ground one on the issue of circumstantial evidence.

The evidence implicating the appellant was that given by Frank Sangu Mwanza (PW1), Oscar Mumba (PW2) and White Mumba (PW3). They all identified him in court and the trio told the learned trial Judge that they were in the company of the appellant and the deceased on 28th July, 2016 playing cards at Frank Sangu Mwanza's place. PW1 and PW2 both told the trial court that the appellant wore football boots on the material day. Even though the learned trial Judge did not dwell on it, there was also the evidence of Detective Inspector Kyembe Mackinon (PW7) that he observed football prints at the scene where the body was found. He went on to confirm to the court in cross-examination that there was no connection between the appellant's alleged boots - P1 and the prints found at the scene. Detective Inspector Mackinon told the learned trial Judge that he did not rule out the possibility that some of the people at the scene wore boots.

From this evidence on record the learned trial Judge was satisfied that the circumstantial evidence had taken the case out of the realm of conjecture so that it attained such a degree of cogency which could permit only an inference of guilt.

In the case of **David Zulu v. The People *supra*** the Supreme Court gave sound guidance as to what circumstances would warrant a conviction on the basis of circumstantial evidence. The Supreme Court held *inter alia* that:

> "***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".***

The other evidence not considered in the lower court's Judgment is that of Detective Inspector Mackinon that the other person seen with the deceased was Victor who had since disappeared after the death of the deceased and could not be found. Given that the police could not match P1 to the prints at the scene, there is a possibility

that someone else other than the appellant wore boots at the scene and Victor could have killed the deceased and ran away, we find that the inference of guilt drawn by the lower court was not the only possible inference. The finding that the appellant killed the deceased is not supported by the evidence.

In the case of the ***Director of Public Prosecutions v. Ngandu and others***[8] the Supreme Court held that an appellate court could interfere with a finding of fact if it was made without any evidence or on a view of the facts which could not reasonably be entertained. In our view, this is an apt case in which to set aside the finding that the circumstantial evidence in this case had taken the case out of the realm of conjecture to permit only an inference of guilt and we hereby set it aside. The inference that someone else wore the boots cannot be ruled out. We thus allow ground one of this appeal.

Turning to ground two on odd coincidences, the learned trial Judge found it an odd coincidence that the accused was wearing soccer

boots on the material night and that football boot prints were found at the scene.

In the case of **Ilunga Kabala and John Masefu v. The People *supra*** the Supreme Court held *inter alia* that:

> " ***(viii) it is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true, is in this connection no explanation".***

In this case, going by the circumstantial evidence on record to which we have alluded to, we accept the appellant's submissions in total. We note that the court below did not even refer to the evidence of Detective Inspector Mackinon. He told the court that there was no correlation between P1 and the prints at the scene. There was therefore nothing odd about football boot prints at the scene since the same did not connect the appellant to the commission of the offence.

In the case of ***Kalebu Banda v. The People***[9] the Supreme Court held *inter alia:*

> ***"The first question is whether the failure to obtain the evidence was a dereliction of duty on the part of the police which may have prejudiced the accused. When evidence has not been obtained in circumstances where there was a duty to do so –and a fortori when it was obtained and not laid before the court and possible prejudice has resulted, then an assumption favourable to the accused must be made".***

In this case, the police's failure to investigate the prints and their link to P1 which was in their custody, amounted to dereliction of duty. They had a duty to investigate in order to tie the appellant to the offence or to rule him out altogether. This prejudiced the appellant's case and created an assumption favourable to him. To hold otherwise in our view was a misdirection.

In the view of the forestated, we find merit in ground two of the appeal and accordingly allow it.

In sum, we find that the appellant was convicted on unsatisfactory evidence. We allow this appeal, quash his conviction and set aside the sentence.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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P.C.M. NGULUBE
COURT OF APPEAL JUDGE