IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 48/2019

(Criminal Jurisdiction)

BETWEEN:

LACKSON HAMANGABA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Chisanga JP, Majula & Ngulube, JJA
On 20th August 2019 and 29th August, 2019

For the Appellant: *Mr. P. Chavula, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent: *Mrs. M. G. Kashishi-Ngulube, Acting Principal State Advocate, NPA.*

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Bwanausi vs The People (1976) ZR 103.*
2. *Peter Yotamu Haamenda vs The People (!977) ZR 184*
3. *Machipisha Kombe vs The People (2009) ZR 282*

4. *Ilunga Kabala & John Masefu vs The People (1981) ZR 102.*
5. *Yokoniya Mwale vs The People Appeal No 285/2014.*
6. *Chimbini v The People (1973) ZR 192.*
7. *David Zulu vs The People (1977) ZR 151*

Legislation referred to:

Penal Code Chapter 87 of the Laws of Zambia.

Introduction

This appeal emanates from the conviction of Lackson Hamangala *(hereinafter referred to as the appellant)* for the murder of his wife Mutinta Hachisala *(hereinafter referred to as the deceased)* on 10th January, 2017 in Kabanya village, Monze. The appellant was tried and convicted in the High Court and sentenced to suffer the mandatory death sentence prescribed for murder.

Prior to his conviction the appellant was a farmer in Monze, and was in a polygamous marriage with two women namely, Mainza Milimo and Mutinta Hachisala, senior and junior wife, respectively.

Evidence in the Court below

In the Court below, the prosecution evidence was anchored on the testimony of five witnesses. PW1 was Funny Hachisala father of the deceased. The kernel of Funny's evidence was that on 10th January, 2017, while in the field, around 13.00 hours he received a message that his daughter Mutinta Hachisala had died at her

husband's village. He rushed to the scene and found the deceased lying lifeless on the floor in her bedroom. He wrapped her in chitenge material and took her body to the sitting room. He observed white foam coming from her mouth.

He went on to testify that when he asked the appellant what caused Mutinta's death, the appellant told him that she had taken a noxious substance for cattle dip called tritex.

Ultimately the body was taken to Monze hospital and the matter reported to the police. PW1 informed the court that the appellant used to beat her on several occasions in the marriage and she would report this to him. He went on to narrate to the court how the appellant used to beat up his daughter during the subsistence of their marriage and that she would leave her home and go to his place and give a report. He went on to explain that they had appeared at traditional courts on several occasions. In terms of medical proof regarding the treatment she received after the beatings PW1 said that unfortunately he did not have the records in his possession as his house had been burnt by fire the previous week and all the documents were also burnt. The long and short of his evidence was that the appellant and the deceased had a tumultuous relationship.

Doctor Tshipuik Odon Kanyoka (PW2) stated that he conducted a postmortem on the body of the deceased on 13th January, 2017. On examining the body, he found clotted blood in the mouth. The neck was very loose in that the head would go beyond the shoulder.

He also found that the third cervical vertebra was fractured and a heavy collection of blood on the right side of the chest. He concluded that the cause of death was severe chest and neck injuries.

Medson Hamangaba (PW3) told the court that on 8th January, 2017, he was invited by the deceased to mediate over a marital dispute she had with the appellant and his first wife. He stated that he managed to resolve the issue which involved a bicycle and there was no confrontation between the couple.

The prosecution then called Kelvin Miyoba (PW4) who narrated that on 9th January, 2017, the appellant went to his house and asked if he could spend a night there. Upon asking him why, the appellant said he had overheard people conversing near his house that they would apprehend him for having impregnated a young girl. The appellant spent the night at Kelvin Miyoba's house and left the next morning around 05.00 hours.

Godfrey Musonda (PW5) the arresting officer confirmed having received a report of murder on 12th January, 2017. He arranged for a postmortem which was done on 13th January, 2017 by Dr. Kanyuka Tshipuilk. He arrested and charged the appellant for the subject offence.

Appellant's defence

The appellant categorically denied killing his wife. His version of events was that on 10th January, 2017 he woke up and started preparing to go to the field by yoking his oxen.

He called his wives by their respective names. He proceeded to go to the field with the first wife, Mainza and they left Mutinta at home to prepare food to take to the field. After observing that a period of time had elapsed and Mutinta had not emerged, the appellant was in wonderment as to her whereabouts. He then sent his son, Isaac aged between 5 and 6 years at the time to check on his wife. Isaac returned with the news that his mother was sick and unresponsive. Upon receiving this news, the appellant in the company of Mainza and other women who were ploughing their fields nearby went to the house and established that Mutinta was deceased.

He did not observe any injuries on her body. Mutinta's body was initially taken to Monze Police Station and subsequently it was deposited at the mortuary.

In his evidence the appellant denied there being grave misunderstandings in his marriage and stated that the two wives had a cordial relationship. Regarding the events of 8th January, 2017, he admitted that there was a squabble between the wives over a bicycle which issue was resolved with the help of his brother Medson Hamangaba. On that particular day according to the appellant, there was no physical confrontation. He further testified that he used

to alternate where he spent nights and between the 8th and 10th January, 2017 he slept at Mainza Milimo's home.

He rebuffed having informed his father in law, Funny Hachisala that his daughter Mutinta had taken a pesticide for dipping cattle. He also rejected the allegation by Kelvin Miyoba that he went and requested to spend a night at his place on 9th January, 2017. He went on to state that prior to the deceased's death, Kelvin had accused him of practicing witchcraft. The long and short of the appellant's story was that he had no knowledge as to how his wife met her death.

Findings by the trial Court

After analyzing the evidence before her, Judge Banda-Bobo found that although Funny Hachisala and Kelvin Miyoba may fall in the category of suspect witnesses, they had no motive to falsely implicate the appellant. They were found to be credible witnesses.

The Judge went on to find that the appellant's marriage was characterized by problems. That the evidence of the deceased's father Funny to the effect that his house had been burnt earlier and the book in which the clinic used to record when the deceased sought medical attention got burnt was not controverted.

The learned Judge further found that the deceased did not die of natural causes but died as a result of severe head and neck injuries

as revealed by the postmortem report and not as a result of poisoning.

Judge Banda-Bobo was of the view that there was no evidence to the effect that during the period 8th and 10th January, 2017, the appellant slept in the senior wife's house. Finally, the learned trial Judge held that the circumstantial evidence had taken the case out of the realm of conjecture such that the only inference to be drawn was that the appellant is the one who caused the death of the deceased.

Grounds of Appeal

Disenchanted by this judgment the appellant has appealed on two grounds, framed as follows:

(i) The learned trial Judge erred and misdirected herself both in law and fact when she convicted the appellant based on circumstantial evidence which permitted other possible inferences.

(ii) The learned trial Judge erred both in law and fact when she convicted the appellant in the face of glaring dereliction of duty on the part of the investigations officer in failing to gather evidence which was capable of exonerating the appellant.

Appellant's Argument

As regards ground one, the main point argued by Mr. Chavula, counsel for the appellant was that the circumstantial evidence in this matter is not cogent, such that an inference of guilt is not the only inference which can reasonably be drawn from the facts. Mr. Chavula argued that there is a possibility that the deceased was murdered by someone else other than the appellant. He pointed out the evidence at page 133 of the record which discloses that the day before the deceased was found dead, there was an argument involving the deceased, the first wife and the appellant over a bicycle. That these differences were also highlighted by Medson Hamangaba who was invited to mediate over the bicycle issue.

It was contended on this state of affairs, that there is a possibility that the first wife could have committed the offence. The case of ***Bwanausi vs The People***[1] was cited for the proposition that where a conclusion is based purely on inference, that inference may be drawn only if it is the only reasonable inference on the evidence.

In relation to ground two, learned Counsel submitted that in the court below there was evidence to the effect that there was a dependant who the couple was keeping but after the incident, the child was sent to Mumbwa and all efforts to speak to the child were frustrated by the relatives of the deceased.

He lamented that this explanation by the investigations officer shows a clear case of dereliction of duty. The case of ***Peter Yotamu Haamenda vs The People***[2] was called in aid for the proposition that

a dereliction of duty should be resolved in favour of the accused and result in an acquittal unless there is overwhelming evidence against the appellant. Counsel implored us to uphold the grounds of appeal and quash the conviction.

Respondent's arguments

In her brief response, the learned Acting Principal State Advocate Mrs. Kashishi-Ngulube submitted in respect to ground one that the circumstantial evidence connecting the appellant to the offence was so overwhelming to permit only an inference of guilt.

She pointed out that the actions of the appellant on the night before of having a difference with the deceased which required Medson to go and settle, his actions of going to spend a night at Kelvin's house and further not bothering to find out what caused the death of his wife and lying to Funny that the deceased had consumed poison, all point to the appellant as the perpetrator of the offence.

Citing the cases of ***Machipisha Kombe vs The People***[3] and ***Ilunga Kabala & John Masefu vs The People***[4] it was argued that odd coincidences if unexplained may be considered as supporting evidence of something more.

It was further submitted that the issue of Funny and Kelvin being suspect witnesses does not hold water in that the trial Judge adequately addressed the issue when she relied on the case of ***Yokoniya Mwale vs The People***[5]. It was further submitted that the

trial Judge ruled out any motive to falsely implicate the appellant by these two witnesses.

In relation to ground two it was submitted that although Detective Inspector Musonda can be said to have committed a dereliction of duty in failing to bring to Court a dependant of the appellant and the deceased who was taken to Mumbwa after the incident, the evidence linking the appellant to the offence was so overwhelming to offset the prejudice which might have arisen. We were implored to dismiss the appeal and uphold the decision of the Court below.

This appeal raises two fundamental issues. Firstly, there is the aspect in relation to the conviction being based on circumstantial evidence. That based on the evidence on record, it is possible that someone else committed the offence against the deceased other than the appellant. It has been suggested that the first wife may have had a grudge against the deceased as the two of them had an altercation over a bicycle a day prior to the death of the deceased. The possibility that the first wife could have been the perpetrator of the offence entitles the appellant to a favorable inference that he didn't commit an offence and this should therefore be resolved in his favour.

The second limb of the appeal is anchored on what is perceived as dereliction of duty on the part of the investigating officer. It has been contended that the investigating officer failed to gather evidence

which was capable of exonerating the appellant. We will deal with the two grounds of appeal as they were presented.

Circumstantial evidence

The law as to when a person can be convicted based purely on circumstantial evidence is well settled but perhaps bears repeating. In ***Chimbini v The People***[6] the Supreme Court observed as follows:

> *"Where the evidence against an accused person is purely circumstantial and his guilt is entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference drawn from the facts."*

A few years later in the case of ***David Zulu vs The People,***[7] the Supreme Court in similar fashion guided on how circumstantial evidence should be treated. It warned against drawing wrong inferences. They expressed themselves in the following words:

> *"It is therefore 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, 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".*

We are conversant of the above authorities and we will accordingly examine the evidence on record bearing these authorities in mind. What is not disputed is the fact that the deceased died on

10th January 2017. According to the postmortem report, the cause of death was severe chest and neck injuries. The medical doctor who carried out the postmortem, Dr. Tshipuik Odon Kanyoka did adduce further oral evidence in Court regarding the injuries sustained by the deceased. In his opinion the cause of the injuries was attributable to violence or accident.

It is clear from the evidence that the appellant had two wives and there was disagreement between them over a bicycle on 8th January 2017. The appellant's brother Medson Hamangaba (PW2) was called in to mediate the dispute. There is further evidence that on this particular occasion the confrontation between the two wives was not physical. There is however evidence on record that the relationship between the appellant and his wife had its fair share of problems and was characterized by violence. There were however no medical documents indicating injuries the deceased sustained at the hands of the appellant as they were burnt in a fire. No records were made available regarding the traditional courts that were convened to resolve the conflicts that plagued their household suffice to say the appellant's marriage to the deceased did have some controversy. From the evidence on record, we cannot fault the trial Judge from arriving at the finding that the marriage was characterized by problems.

The cause of death as already noted is clear however the question is who is actually responsible for the deceased's death? It has been spiritedly argued that no one having seen the perpetrator,

there are other inferences that could have been drawn. A scrutiny of the record does indeed suggest that perhaps the first wife could have harbored ill motive towards the second wife. This inference is being drawn from the squabble they had over a bicycle. However, the trial Judge eliminated her as a suspect based on the other evidence on record. The pieces of evidence against the appellant not only place him at the scene but drive us to only one inference.

His strange behavior is what convinces us that he is the perpetrator. The following facts have been established:

1. There was a history of violence in the marriage. The trial Judge made a finding that were problems in the marriage based on the evidence of PW1, PW3 and the appellant himself which cannot be assailed as it is supported by the evidence on record.

2. On 9th January, 2017 at 22.00 hours the appellant went to spend a night at PW4's house for the reason that he feared being apprehended on account of having impregnated a young girl.

3. On 10th January 2017, appellant's wife Mutinta Hachisala was found dead. When her father (PW1) went to the house upon being informed of her death he observed that foam was coming out of her mouth. Upon enquiring from the appellant as to the cause of her death, the latter volunteered an explanation that the deceased has consumed cattle dip known as tritex.

The trial Judge was entitled after considering this evidence to come to the conclusion that an inference of guilty was the only one that could be arrived at.

The appellant had a violent history with the deceased. Although the evidence reveals that she was found dead on the 10th, the appellant fled from his home to spend a night at PW4's home, for fear of apprehension on account of impregnating a girl, on the 9th as narrated by PW4. This account was accepted by Bobo J, who had the advantage of seeing the witnesses and assessing their demeanor. We find this behaviour bizarre in that nowhere is it revealed on the evidence that the appellant faced a charge of impregnating a young girl after the appellant had sought abode in PW4's house. To clinch the whole matter, he volunteered the cause of death as ingestion of cattle dip, when there was no evidence of this, as revealed by the postmortem report, which stated the cause of death was severe neck and head injuries. It is strange for a person to volunteer a cause of death meant to shift suspicion from oneself when they had nothing to do with a death. This was a person whose wife had died from the stated injuries, but purporting to explain the death on account of poisoning, this strange behavior leads to only one irresistible inference and this is that he had something to do with the death of the deceased.

We hold the view that the trial Judge was on firm ground in finding that the circumstances of the case had taken the case out of the realm of conjecture and could only permit an inference of guilt.

The test as laid out in the ***David Zulu***[7] and ***Chimbini***[6] cases were properly applied.

In light of the foregoing we find no merit in ground 1 and accordingly dismiss it. We now turn to ground 2.

Dereliction of Duty

The appellant is contending that there was dereliction of duty by the investigating officer. There was an explanation given as to why a child dependant was not brought before court. This was to effect that she had been taken back to Mumbwa district and all the relatives refused to lead him to where she had been taken. It is plain to note that his efforts were frustrated. We take the view that the actions of the investigating officer did not amount to dereliction of duty in light of the explanation tendered.

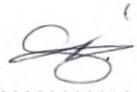
In our view, the case of ***Peter Yotamu Hamenda v The People***[2] which is instructive on what amounts to dereliction of duty and which has been called in aid by the appellant, is clear that an acquittal can arise if evidence that would have been favorable to him has not been adduced. That this would amount to dereliction of duty. The ***Hamenda***[2] case takes it a step further in explaining that it would not necessarily lead to an acquittal if the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which may have arisen from the dereliction of duty.

The prosecution evidence must thus be found to be **so overwhelming** to offset the prejudice, which we so hold in this case.

The circumstantial evidence discloses that the appellant is the one that had opportunity to commit the crime and coupled with his peculiar behabaviour, the inference to be drawn was that he assaulted the deceased thereby occasioning her death. We are satisfied that the Court below arrived at her findings after a painstaking analysis of the evidence and she cannot be faulted. We therefore find the second ground of appeal to be equally bereft of merit and dismiss it.

Conclusion

In sum the appeal lacks merit in its entirety and we dismiss it. We uphold both the conviction and the sentence.



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F. M. Chisanga
JUDGE PRESIDENT

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B.M. Majula
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE