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

APPEAL 103,104/2019

BETWEEN:

NKANDU MUSONDA — 1ST APPELLANT

EMELDAH MUMBA — 2ND APPELLANT

AND

THE PEOPLE — RESPONDENT

CORAM: Mchenga DJP, Sichinga and Majula, JJA

On 19th November 2019 and 28th February 2020.

For the Appellants: Mr. K. Katazo- Senior Legal Aid Counsel
Legal Aid Board

For the Respondent: Mrs. G. Mulenga - Principal State Advocate,
National Prosecutions Authority

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# J U D G M E N T

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Mchenga, DJP, delivered the judgment of the court.

Cases referred to:

1. Miyoba v The People [1977] Z.R. 218
2. Sakala v The People [1980] Z.R. 205
3. David Zulu v The People [1977] Z.R. 151
4. Dorothy Mutale and Richard Phiri v The People (1997 S.J. 51
5. Phiri and Richard Phiri v The People [1973] Z.R. 47
6. Mbinga Nyambe v The People [2011] 1 Z.R. 246

7. Nkhata And Four Others v The Attorney-General of Zambia [1966] Z.R. 124
8. Maseka v The People [1972] Z.R. 9

**Legislation referred to:**

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

**Introduction**

1. This appeal emanates from the judgment of the High Court (M. Chanda J.), delivered in Livingstone, on 3rd August 2019.
2. The appellants, appeared before that court on an information containing one count of the offence of murder contrary to **section 200 of the Penal Code.** The allegation was that on 13th January 2018, at Livingstone, jointly and whilst acting together, they murdered Edwin Mungala.
3. They both denied the charge and the matter proceeded to trial. At the end of the trial, they were both convicted of the offence and condemned to suffer capital punishment.
4. This is an appeal against the convictions.

**Evidence before the trial court**

5. On 13th January 2018, Alex Muketoi threw a birthday party at the poolside of the Livingstone Royal Golf Club. The host was the 1st appellant, who worked at the golf club and present with him, was the 2nd appellant, his girlfriend.

6. The party began around 14:00 hours and the persons in attendance included Edwin Mungala, Keagan Alisanda Mlaambo, Leonard Siwale, Alex Muketoi, Ramson Chilulwe and Jeff. Between 18:00 and 19:00, Edwin Mungala was seen in the pool and the 1st appellant and Alex Muketoi dived into the pool and retrieved him. Thereafter, the 1st appellant applied first aid to resuscitate him, but it was in vein. Keagan Alisanda Mlaambo, Alex Muketoi, Ramson Chilulwe and Leonard Siwale, denied seeing the appellants assault Edwin Mungala or seeing how he ended up in the swimming pool.

7. Keagan Alisanda Mlaambo, Alex Muketoi, Ramson Chilulwe and Leonard Siwale suggested that they take him to the hospital because he was non-responsive. The 1st appellant told them that it was not necessary because he was not

dead; he was just drunk and was going to come around. He warned them that taking him to hospital would bring the police into the picture. He also told them that if that were to happen, he would deny being present at the party or even being with Edwin Mungala on that day.

8. According to the 1st appellant, when he suggested that they take him home, Alex Muketoi refused. Since he knew where Edwin Mungala stayed, he offered to take him home. After he was dressed up, they carried him to where a taxi would pick him as he was unable to walk on his own. As they did so, two bottles fell out of his pockets. One was of Codeine, a prescription drug and the other was of alcohol.

9. As the 1st appellant was looking for a taxi, Robert Musazulwa arrived to pick up Leonard Siwale, Keagan Alisinda Mlaambo and Alex Muketoi. He observed that though Edwin Mungala appeared unwell, he was still breathing. He offered to take him to the hospital but the 1st appellant declined the offer insisting that he was just drunk and that he would take him home. He hired Thomas Chirwa's taxi and they left the golf club.

10. Thomas Chirwa's taxi carried Edwin Mungala, the two appellants, Jeff and Jeff's girlfriend, and they headed for Libuyu Compound. Before they could get to Edwin Mungala's home, Thomas Chirwa told his passengers to disembark as he had to pick another client, he had a prior arrangement with. Thomas Chirwa's observation at that point, was that Edwin Mungala's condition had not improved. He was shaking but he did not utter a word. He had to be lifted out of his taxi by the 1st appellant and Jeff.

11. According to the 1st appellant, after they got out of the taxi, they helped Edwin Mungala walk home. On the way, they met 3 men and Jeff excused him, saying the three men, who were friends, where going to help him take Edwin Mungala home. The 1st appellant said he went to his mothers' house.

12. That evening, around 20:00 hours, Edwin Mungala was picked from the road side, near the house where he lived by George Mwila. He was unconscious and bleeding from the nose. His clothes were dirty. They took him to Libuyu

Clinic, where he was certified dead. The incidence was then reported to Libuyu police station.

13. In the days that followed, the two appellants, Keagan Alisanda Mlaambo, Alex Muketoi, Ramson Chilulwe, Thomas Chirwa and Leonard Siwale, were all detained in connection with Edwin Mungala's death. The police looked for Jeff and his girlfriend, but never found them.

14. Dr. Taras Soltytsky conducted postmortem on the body of Edwin Mungala. He observed bruises on the face and intracranial haemorrhage inside the skull. Also broken ribs and rapture of the lungs. He concluded that the cause of death was head injuries.

**Trial judge's findings**

15. The trial judge found that Edwin Mungala died as a result a physical attack. Having visited the golf club during the trial, she took the view that since the party took place in a compact and well-lit place, it is not possible that all the witnesses could not have seen what happened. She concluded that Keagan Alisinda Mlaambo, Ramson Chilulwe, Leonard Siwale and Alex Muketoi, were not entirely truthful in their claims that they did not

know what had happened to Edwin Mungala at the pool that evening. She decided not to attach much weight to their testimony. She accepted Thomas Chirwa and Robert Musazulwa testimony that when they got to the golf club, Edwin Mungala's condition was critical but that the 1st appellant resisted suggestions that he be taken to the hospital.

16. The trial judge also took the view that the 1st appellant's conduct was not consistent with that of an innocent person. While he claimed that he did not know Edwin Mungala prior to the party, he offered to take him home and settle his taxi bill. Further, while he appeared to be keen to take him home, he left him mid-way in Libuyu, with Jeff and unknown people. She attributed that conduct to that of a person with a guilty mind.

17. The trial judge opined that the 1st appellant's resistance to taking Edwin Mungala to the hospital and fear of the police getting involved, was because he had inflicted the injuries that caused his death.

18. She concluded that the only inference that could be drawn from the evidence before her was that the 1st

appellant played a major role in inflicting the injuries Edwin Mungala suffered. After removing him from the swimming pool, the 1st appellant realised that he was dead and decided to cover his tracks by insisting on taking him home when his actual intention was to dump him elsewhere.

19. As regards the 2nd appellant, the trial judge noted that there was no direct evidence of her participation in assaulting Edwin Mungala. However, she was present during the scuffle and in her statement to the police, she mentioned that a quarrel ensued between Edwin Mungala and some of the attendees at the party. There was no evidence that she discouraged her boyfriend from committing the offence. Further, she concealed the fact that the 1st appellant had dumped the body of Edwin Mungala in Libuyu. On the basis of this evidence, she concluded that by omitting to dissuade him, she had aided and abated the 1st appellant's commission of the offence.

**Grounds of appeal**

20. A total of four grounds have been advanced in support of these appeals. In the main, the ground in support of

the 1st appellant's appeal is that an inference of guilt, is not the only one that could have been drawn on the circumstantial evidence that was before the trial judge.

21. As regards the 2nd appellant, two grounds have been advanced in support of her appeal. The first is that the trial judge should not have placed any reliance on the contents of a statement she is said to have made to the police because it was not produced in evidence. The second ground is that the evidence before the trial court did not prove that she aided and abated the commission of the offence.

22. The fourth ground of appeal, which the appellants have termed an "alternative argument" is that the prosecution did not prove, beyond reasonable doubt, that the body that was examined by the pathologist was that of Edwin Mungala.

23. The state does not support the convictions for reasons that will be set out in due course.

**Did the 2nd appellant aid and abate the murder?**

24. Because it is convenient, we will first deal with the arguments in support of the 2nd appellant's appeal.

The first argument was that in determining the case against her, the trial judge erred when she referred to a statement, she is said to have made to the police, which was not produced in court. Mr. Katazo referred to the case of **Miyoba v The People**[1] and submitted that for depositions to be referred to by any court, they must be formally produced during the trial.

25. We accept Mr. Katazo's argument. In the case of **Miyoba v The People**[1] in which the Supreme Court held, *inter alia*, that:

> **(1) The general rule is that the contents of a statement made by a witness at another time, whether on oath or otherwise, are not evidence as to the truth thereof; they are ammunition, and only that, in a challenge of the truth of the evidence the witness has given at the trial.**
>
> **(2) Neither the depositions taken at a preliminary inquiry nor statement to the police which in summary committal proceedings are furnished to the court and the defence, are formally before the court, the court is not entitled to have regard to the contents of such depositions or statements."**

Since the statement that the 2nd appellant is said to have made to the police was not produced by any witness during the trial, the trial judge should not have relied on its

contents when considering the case against her. The case against the 2nd appellant must therefore be assessed without any reference to the statement.

26. Without the statement, there was no evidence incriminating the 2nd appellant in anyway. All the evidence points at, is her presence at the pool and riding on the taxi that was taking Edwin Mungala after he had been retrieved from the swimming pool. None of the witnesses point at her doing or saying anything suggesting that she had anything to do with the injuries he suffered. In our view, properly directing herself, the trial judge would have in fact found her with no case to answer, at the close of the prosecution's case.

**Inference of the 1st appellant being guilty, the only inference?**

27. Mr. Katazo pointed out that the trial Judge's finding that the 1st appellant played a major role in inflicting the injuries sustained by Edwin Mungala was not supported by any evidence. That being the case, there was no basis on which an inference that he was guilty could have been drawn. He referred to the cases of **Sakala**

**v The People**[2], **David Zulu v The People**[3], **Dorothy Mutale and Richard Phiri v The People**[4] and **Phiri and Another v The People**[5], in support of the proposition.

**State's response to the grounds of appeal**

28. As earlier indicated Mrs. G. Mulenga did not support the convictions. She pointed out that some findings on which it was premised, were not supported by the evidence. Particular reference was made to the trial Judge's finding that Edwin Mungala died as a result of a physical injury, but that did not coincide with the pathologist's evidence that his head injuries were caused by an impact or a blunt or hard surface metal bar.

29. As regards the 1st appellant's resistance to take Edwin Mungala to the hospital, she submitted that in the face of evidence that a bottle of codeine fell out of his pocket, it is possible that he would have feared getting in trouble because it was a prescription drug.

30. It is common cause that the case against the 1st appellant is anchored on circumstantial evidence because there is no direct evidence implicating him in the

infliction of the injuries that caused Edwin Mungala's death. After accepting the two taxi drivers' evidence that although Edwin Mungala was unconscious, the 1st appellant resisted the offer or suggestion, that he be taken to the hospital, the trial judge concluded that the resistance was because he wanted to dump the body after discovering that he was dead.

31. In the case of **Mbinga Nyambe v The People**[6], it was held, inter alia, 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; ....."**

Further, in the case of **Nkhata And Four Others v The Attorney-General of Zambia**[7], it was held, *inter alia*, that:

> **" A trial judge sitting alone without a jury can only be reversed on questions of fact if (1) the judge erred in accepting evidence, or (2) the judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (3) the judge did not take proper advantage of having seen and heard the witnesses, (4) external evidence demonstrates that the judge erred in assessing manner and demeanour of witnesses.**

32. Crucial to the conclusion that the 1st appellant committed the offence was the finding that he resisted taking him to the hospital because he discovered that Edwin Mugala had died and he decided to dump the body. He appeared to volunteer to take him home, when his intention was actually to dump him before they reached where he used to stay.

33. The evidence of both Thomas Chirwa and Robert Musazulwa was that when they got to the golf club, they found Edwin Mungala unconscious. According to Robert Musazula, he was still breathing when he was taken to Thomas Chirwa's taxi. They both made no mention of the bruises and bleeding that was observed George Mwila when he picked Edwin Mungala, later that evening.

34. This being the case, the trial judge's conclusion that the 1st appellant decided to place Edwin Mungala in Thomas Chirwa's taxi, to dump him, after he discovered that he was dead, is not supported by the evidence. The evidence actually indicates that he was still alive at the point the decision to place him in that taxi was being made.

35. Further, from the testimony of Thomas Chirwa, it is clear that the decision not to take Edwin Mungala home was not made by the appellant, but Thomas Chirwa. He told the court that he decided to drop his passengers before they reached their destination in order to pick up another customer. In the face of this evidence, there is no basis on which a conclusion could have been arrived at, that the 1st appellant, intended to dump Edwin Mungala, at the time he resisted taking him to the hospital and offered to take him home.

36. In the case of **Maseka v The People**[8], the following guidelines were given on when an inference of guilt can be drawn where an accused person has given an explanation:

> **"….and if an explanation is given, because guilt is a matter of inference, there cannot be a conviction if the explanation might reasonably be true, for then guilt is not the only reasonable inference. It is not correct to say, as was said in this case, that the accused must give a satisfactory explanation. Absence of an explanation which can be regarded as reasonably possible is one of the facts on which the inference of guilt may be based."**

37. In this case, had the trial judge considered whether Jeff's disappearance after Edwin Mungala was found

injured, had any implication on the case, she would have probably come to the conclusion that the 1st appellant's evidence that he went away with Edwin Mungala, shortly before he was found dead, could reasonably have been true. Of all people who were at the party and travelled with him, he is the only one who went into hiding after Edwin Mugala was found dead with injuries. There is no explanation for this conduct.

38. Further, the 1st appellant's reluctance to go to the hospital and get the "police involved", can, as pointed out by Mrs. Mulenga, be attributed to the discovery that Edwin Mungala may have consumed codeine, a prescribed drug, on his premises. It cannot be not wholly be attributed to "a guilty knowledge".

39. Consequently, we find that properly directing herself, the trial judge would not have come to the conclusion that an inference that the 1st appellant inflicted the injuries that cased Edwin Mungala's death, is the only inference that could have been drawn on the evidence that was before her.

**Verdict**

40. In the circumstances we find that the appellants convictions unsafe and unsatisfactory. We accordingly allow their appeals, quash their convictions and set aside the sentences.

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**C.F.R. Mchenga**
**DEPUTY JUDGE PRESIDENT**

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**D.L.Y Sichinga**
**COURT OF APPEAL JUDGE**

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**B.M. Majula**
**COURT OF APPEAL JUDGE**