IN THE COURT OF APPEAL OF ZAMBIA Appeal No.37,38/2016
HOLDEN AT NDOLA
(Criminal Jurisdiction)

B E T W E E N:

FREEMAN CHILAO CHIPULU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM : Mchenga DJP, Chishimba and Kondolo, JJA
On 7th February, 2017 and 12th April, 2017

For the Appellant : Ms. E. Banda – Senior Legal Aid Counsel – Legal Aid Board
For the Respondent: Mrs. M. P. Lungu – Senior State Advocate - NPA

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. **David Zulu Vs. The People (1977) ZR 151**
2. **Chibozu Vs. The People (1981) ZR 28 SC**
3. **Dorothy Mutale and Phiri Vs. The People (1995-97) ZR 227**
4. **Misupi V. The People (1978) ZR 271**
5. **Boniface Chanda Chola Vs. The People (1988/89) ZR 163**
6. **Sakala Vs. The People (1980) ZR 205 (S.C)**
7. **Mbinga Nyambe Vs. The People SCZ No. 5 of 2011**
8. **Said Banda Vs. The People Selected Judgment No. 30 of 2015**
9. **Khupe Kafunda Vs. The People (2005) ZR 31**

LEGISLATION AND OTHER WORKS REFERRED TO:

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

This is an appeal against the Judgment of the High Court of Zambia at Mansa, convicting and sentencing the appellant to death.

The Appellant was jointly charged with his wife Gloria Musonda 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 being that the Appellant and Gloria Musonda on 20th April, 2012 at Chilubi in the Chilubi District of the Northern Province of the Republic of Zambia did murder one Alex Makanta.

Though the Appellant was sentenced to death, his wife Gloria Musonda was sentenced to 20 years imprisonment.

The material evidence adduced by the Prosecution in the Court below was purely circumstantial. The deceased was found hanging in an almost kneeling/squatting position near the corridor behind the appellant's house. According to PW1 she had rushed to the appellant's home upon hearing his wife screaming and shouting that the deceased had hanged himself. She found the deceased hanging with a white cloth rope around his neck. The rope belonged to the appellant's wife. The deceased was untied and laid on the ground.

PW2, a member of the Crime Prevention Unit, testified that upon being informed that a child had hanged himself at the Appellant's home, he had rushed to the house and found that the

body of the child had been taken away. PW2 had found a rope at the scene. The Appellant was later apprehended near his house and taken to Matipa Local Court. Gloria Musonda had run away from the house and was later apprehended.

In addition, PW2 testified that at the time the deceased was found, his body was still warm and that an attempt at resuscitation was done by pouring water on him.

PW3, the deceased's grandmother stated that her daughter, PW4, had informed her that the Appellant had on several occasions requested permission for the deceased to accompany him to the lake. On the 20th of April 2012 whilst she was bathing, she heard people screaming and shouting that the deceased had hanged himself at the Appellant's house. After she dressed up she rushed to the Appellant's house.

On her way, she met the Appellant who was going to a grocery store, though she talked to him, he did not answer. When she got to the appellant's house she found his wife, Gloria Musonda. The deceased's body was on the ground as people poured water on him. PW3 observed that the deceased's eyes were closed, his tongue was

not protruding out, and neither was the neck swollen. PW4 also saw a rope at the crime scene.

The deceased's mother, PW4, testified at trial that the Appellant had persistently requested that her son accompanies him to the lake on several occasions. PW1 finally agreed and allowed her son to go with the Appellant as it was not the first time that the Appellant had asked that he be accompanied to the lake. A few hours after her son had left home, he was found dead at the Appellant's house.

PW5, a Police Officer, attended the post-mortem examination of the deceased conducted on the 6th of June 2014.

PW6, the Investigation Officer recalled having received a report to the effect that a child had been found dead in a suspicious manner. Upon observation of the deceased's body, he saw no physical injuries or strangulation marks. The deceased's eyes were closed and no blood clots were observed on the deceased's neck.

The post-mortem report indicated the cause of death as being brain haemorrhage, traumatic shock and head injuries. Consequently, PW6 charged the Appellant and Gloria Musonda with murder.

The Appellant denied having murdered the deceased. He stated the deceased had committed suicide as evidenced by the fact that he was found hanging with a rope around his neck. The Appellant further stated that the deceased had approached him at his house around 13 hours on the 4th of March 2014 asking to accompany the Appellant to the lake. The Appellant refused to go with him. In addition the appellant stated that he was not at home at the time that the deceased had committed suicide as he had gone to get a bag from his friend.

The trial Court ruled out suicide as a possible inference from the circumstantial evidence and convicted the Appellant relying on the fact that none of the prosecution witnesses (PW3 and PW6) found any marks on the deceased to show that he had hanged himself, coupled with the PW6's evidence, that the deceased's neck had no strangulation marks.

The Court further found as a fact that the deceased was found hanging in a squatting position and not suspended. She further found the appellant's conduct of walking away from home suspicious. The lower court relied on the post-mortem report which showed that the deceased had died of a head injury. The learned

trial judge held that the only inference that could be drawn was that the accused persons had caused the death of the deceased.

The Appellant raised one ground of appeal namely that;

> *The learned court below erred in law and in fact when it convicted the Appellant on circumstantial evidence which raised other inferences other than an inference of guilt.*

The Appellant relied upon the heads of argument dated 7th April, 2017. The gist of the Appellant's argument is that the circumstantial evidence before the trial Court was not conclusive and that it was possible that the deceased hanged himself. The Appellant referred the court to the case of ***David Zulu Vs. The People*** [1] where the Court stated that;

> ***"it is incumbent on a trial Judge that he should guard against drawing wrong inferences from circumstantial evidence at his disposal before he can feel safe to convict."***

The Appellant argued that the Court misapplied the principles espoused in the cited case of ***David Zulu Vs. The People (Supra)*** as the circumstances of the facts of this case do not take the case out of the realm of conjecture. Further, that there was no motive whatsoever for the appellant to commit the offence of murder.

It was contended that there are other possible inferences that could be drawn other than that the deceased was murdered such as an inference of suicide. Further, that there are several other explanations as to why the deceased was found in an almost kneeling such as the weakness of the mosquito net/rope used by the deceased.

The Appellant further contended that there were conflicting statements by PW1, PW2 and A1 on the one hand and PW3, PW4 and PW6 on the other hand as to whether the deceased was still showing signs of life at the time he was found by PW3. That the deceased was in fact showing signs of life at the time he was found which explains why his eyes were not protruding and his tongue was not out as the suicide was incomplete.

In addition, that PW3 being the deceased's grandmother had a motive to fabricate evidence to the detriment of the Appellant. The Appellant went further to argue that PW3 and PW4 were suspect witnesses and the Court ought to have warned itself before convicting on their evidence.

It was contended that the post-mortem report generated after the examination of the deceased was inconclusive as it showed that

the cause of death was brain haemorrhage, traumatic shock and head injuries without indicating how the said conditions were actually caused. In addition that the post-mortem report did not indicate whether the injuries sustained by the deceased were consistent with murder or suicide. Further that, a pathologist was not called by the prosecution to explain the post mortem report. We were referred to the case of ***Chibozu Vs. The People*** [2] where the Supreme Court held that;

> ***"Medical reports usually require explanation not only of the terms used but also of 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."***

The Appellant maintained that there are various reasonable inferences that may be drawn from the circumstances surrounding the deceased's death and the injuries he sustained such as follows; that he committed suicide, that the head injury was as a result of a fall owing to the weak rope used, that the deceased was dropped by people that carried him or that the deceased was hanged by a stranger. Our attention was drawn to the case of ***Dorothy Mutale and Phiri Vs. The People*** [3] in which the Supreme Court stated that 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. Counsel urged the Court to uphold the appeal and set the appellant at liberty.

Counsel for the Respondent, Mrs Lungu made *viva voce* submissions. Mrs. Lungu submitted that the State does not support the conviction by the trial Court for the following reasons; that the clear cause of death of the deceased was head injury. Further, that though the possibility that the deceased had committed suicide was ruled out, the record will show that at the time the deceased was found hanging, the Appellant was not home but was seen away from the scene. This fact was confirmed by PW1 who testified that when she rushed to the scene the appellant was not there, she found Gloria Musonda his wife.

We have considered the evidence on record, the judgement subject of appeal, the authorities cited and the submissions by the both Learned Counsel.

The Appellant was convicted on the basis of circumstantial evidence. The cardinal issue for determination before us is whether the circumstantial evidence relied on by the trial Court had taken the case out of the realm of conjecture, thereby attaining a degree of

cogency so as to permit only an inference of guilt on the part of the Appellant.

Before determining the issue of whether the circumstantial evidence was cogent and out of the realm of conjecture, we will determine the issues raised by the appellant in respect of the evidence of PW3 and PW4. The appellant argued that PW3 and PW4 are witnesses with possible interest of their own to serve.

PW3 is the grandmother and PW4 is the Mother to the deceased. The consideration by courts in respect of witnesses with a possible interest or purpose of their own to serve is whether because of the particular category of persons they fall into or circumstances of the case, the witnesses may have a motive to give false testimony. We refer to the case of ***Misupi V. The People*** [4] in which the Supreme Court held that

> **"The tendency to use the expression, 'witness' with an interest to serve or (purpose) carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have an interest or purpose of his own to serve, but whether he is a witness who because of the category into which he falls or because of the particular circumstances of the case, he may have a motive to give false evidence"**

We are of the view that the mere fact that a witness is a relative does not entail that he or she must be regarded as a

suspect witness. From the evidence adduced we do not see any motive by PW3 and PW4 to give false testimony against the appellant. In the case of ***Boniface Chanda Chola Vs. The People*** [5] the Supreme Court held that;

> **"....the critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence. Where it is reasonable to recognize this possibility, the danger of false implication is present and must be excluded before a conviction can be held to be safe....."**

The learned trial judge did address the issue of PW3 and PW4 being witnesses with a possible interest to serve. After analyzing their evidence and the Appellant's, she found as a fact that the PW3 and PW4 were not witnesses with possible interests of their own to serve. We cannot fault the Learned Trial Judge as she had correctly considered and excluded the danger of the motive to give false evidence.

The other issue raised was in respect of the conflicting statements by PW1, PW3, PW4, PW6 and the Appellant; whether the deceased was in fact showing signs of life at the time he was found hanging. The alleged conflicting evidence being that PW6, PW3 and PW1 stated that the deceased eyes were open. Further

that attempts were made to resuscitate the deceased, therefore the deceased was still showing signs of life.

We have analyzed the evidence, PW1 who rushed to the scene and found the deceased hanging testified that she saw other people at scene untie the robe from the deceased and attempts were made to resuscitate him. PW6 and PW3 testified that the deceased eyes were closed whilst the appellant's wife testified that his eyes were open.

It is trite that a court faced with conflicting evidence must resolve the credibility issue and show on the face of it why a witness has who has been contradicted by others is to be believed.

In our view the evidence whether the deceased was still showing life, whether his eyes were open and the attempts made at resuscitating him does not go to the root of the issue. The key issue was whether a reasonable inference of murder or suicide could be drawn from the circumstantial evidence.

It is trite that circumstantial evidence is not direct evidence as to the commission of an offence. We refer to the case of ***David Zulu Vs. The People*** [1]. The Supreme Court aptly summed up and discussed the nature of circumstantial evidence by holding 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 fact 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.***

(iii) ***The appellant's explanation was a logical one and was not rebutted, and it was therefore an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue.***

Further, in the case of ***Sakala Vs. The People*** *(6)* it was held that to safely convict on circumstantial evidence, the evidence must be so cogent and compelling that no rational hypothesis other than murder could be ascertained from the facts.

It is a settled principle of criminal law that for a Court to properly rely and consequently convict upon circumstantial evidence, the evidence ought to be so cogent that it removes the case from the realm of conjecture. It is only on this basis that a Court may safely convict on circumstantial evidence. We refer to the case of ***Mbinga Nyambe Vs. The People***[7] where the Supreme Court stated as follows;

> "***a trial 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***."

Further, in the Supreme Court case of ***Saidi Banda Vs. The People*** [8] the Court made the following observation;

> ***"We, however, wish to restate the law as regards circumstantial evidence by adding that this form of evidence, notwithstanding its weakness as we alluded to in the David Zulu case, is in many instances probably as good, if not even better that direct evidence."***

It is not in dispute that there was no eye witnesses who saw the Appellant kill the deceased. A perusal of the record will show that the circumstantial evidence implicating the Appellant was as follows; that the appellant had been repeatedly asking PW4 for permission for her son, the deceased, to accompany him to the lake. PW4 acquiesced to the request and on 4th of March 2014 allowed her son to accompany the appellant. The deceased was found hanging at the Appellant's house on the day that the Appellant had requested for him to accompany appellant to the lake. PW3 had met the Appellant on her way to his house shortly after she heard people shouting and screaming that her grandson had hanged himself. When PW3 spoke to the Appellant he did not respond or answer her. Whilst everyone else was running or going to his home,

the appellant was walking away. In addition the post mortem report ruled out suicide.

The Appellant emphatically argued that one of the other inferences to be drawn was suicide. In addition that there were other probable inferences other than pointing to the guilt of the Appellant such as that; the deceased was dropped and had hit his head whilst people were attempting to lift him up and untie him.

The record will show that PW3 testified that no strangulation marks were seen or found on the deceased's neck. Further, PW5, a police officer, equally did not see or observe any physical injuries or strangulation marks on the deceased's neck after a physical inspection of the deceased's body to suggest that the deceased attempted or did indeed commit suicide. The post mortem report ruled out suicide as the cause of death.

In our view the inference of suicide was correctly ruled out by the trial Judge. There were no strangulation marks consistent with suicide and the post mortem indicated the cause of death as head injury.

We are of the view that the circumstantial evidence before the trial court was so cogent that it had taken the case out of the realm

of conjecture with the only inference being or pointing to the guilt of the Appellant. The circumstantial evidence connecting the appellant was overwhelming. We refer to the Supreme Court decision in the case of ***Khupe Kafunda Vs. The People*** [9] where the Court held that:

> ***"There was no direct evidence and no eye witness to the incident that led to the death of the deceased. However, the circumstantial evidence was so overwhelming and strongly connected to the Appellant to the commission of the offence".***

We are therefore of the view that the inference of a suicide does not arise given the circumstances. Even if we were to find that PW3 and PW5 did not actually inspect or properly inspect the deceased's body the post-mortem report revealed that the cause of death was brain haemorrhage, traumatic shock and head injuries. The post-mortem report ruled out any suicide by the deceased.

With regards the argument that the deceased could have hit his head either after the rope he hanged himself with gave way due to its weakness or that the deceased was dropped by people as they tried to lift him; we are of the view that none of these postulations are viable. Firstly, the deceased was found in a kneeling position which rules out the argument that the rope he used was not strong enough so he fell and hit his head. The question is; how then could

he have been found in a kneeling position? Secondly, none of the witnesses testified that the deceased had been dropped at any point. We find the arguments advanced by the Appellant speculative with regards possible inferences that could be drawn from the circumstances. For this reason, we do not accept them.

We are of the firm view that the circumstantial evidence against the Appellant was overwhelming and took the case out of the realm of conjecture warranting, only, an inference of guilt on the part of the Appellant.

As to the requisite malice aforethought, **Section 204 of the Penal Code** defines "malice aforethought" in the following terms:

> ***"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:***
>
> ***...Knowledge that the act or omission causing death will probably cause the death or a grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused;***

The nature of the injuries stated in the post-mortem report as to the cause of death namely haemorrhage, and head injuries alludes to grievous harm constituting malice aforethought.

With regards sentencing, it is trite that a person convicted of an offence of murder ought to be sentenced to death in the absence of any extenuating circumstances. **Section 201 of the Penal Code** provides as follows;

> "***Any person convicted of murder shall be sentenced; to death; or (b) where there are extenuating circumstances, to any sentence other than death.***"

We have considered whether there were any extenuating circumstances to warrant any other sentence other than death. We find no such extenuating circumstances.

We accordingly uphold the conviction and sentence passed by the lower Court. The appeal is hereby dismissed.

.....

C. F. R. Mchenga, SC
DEPUTY JUDGE PRESIDENT

.....

F.M. Chishimba
COURT OF APPEAL JUDGE

.....

M. M. Kondolo, SC
COURT OF APPEAL JUDGE