

**IN THE COURT OF APPEAL OF ZAMBIA      APPEAL No. 36/2016**  
**HOLDEN AT NDOLA**  
*(Criminal Jurisdiction)*

**B E T W E E N:**

MWAPE KASONGO

**AND**

THE PEOPLE



**APPELLANT**

**RESPONDENT**

**CORAM      : Mchenga DJP, Chishimba and Sichinga, JJA**  
**On 8<sup>th</sup> February, 2017 and 12<sup>th</sup> April, 2017**

*For the Appellant : Mr. Chavula, Senior Legal Aid Counsel – Legal Aid Board*  
*For the Respondent: Mrs. M.P Lungu, State Advocate-National Prosecution Authority*

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**J U D G M E N T**

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***CHISHIMBA, JA, delivered the Judgment of the Court***

**CASES REFERRED TO:**

1. **Ilunga Kabala and Joseph Masefu Vs. The People (1981) ZR 102**
2. **Uganda Vs. The Yowara Baptist Kabandize (1982)**
3. **Yoani Manongo Vs. The People (1981) ZR 152**
4. **Mwewa Vs. The People (2004) ZR 207**
5. **Green Museke Kuyewa Vs. The People (1996) ZR 8**
6. **Simutenda vs. The People (1975) ZR 294**
7. **Kalenga and Another Vs. The People (1968) ZR 181**
8. **Abel Banda Vs. The People (1986) ZR 105**
9. **Miyoba Vs. The People (1977) ZR 218**
10. **Chuba Vs. The People (1976) ZR 272**

11. **David Zulu Vs. The People (1977) ZR 151**
12. ***Saidi Banda Vs. The People Selected Judgment No. 30 of 2015***
13. ***Khupe Kafunda Vs. The People (2005) ZR 31***
14. ***Machipisha Kombe vs. The People (2009) ZR 282***
15. ***Shawaz Fawaz and Prosper Chelelwa Vs. The People (1995-97) ZR 3***
16. ***Sithole Vs. The State Lotteries Board (1975) Z.R.106.***

**LEGISLATION AND OTHER WORKS REFERRED TO:**

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

The Appellant was convicted of the offence of murder contrary to **Section 200 of the Penal Code Cap 87 of the Laws of Zambia** and sentenced to death by the High Court.

The particulars of the offence being that, on the 4<sup>th</sup> of March 2014, at Mwense in the Mwense District of the Luapula Province, the Appellant murdered his wife Eunice Bwalya (hereinafter referred to as “the deceased”).

The material evidence before the Learned Trial Court as adduced by the prosecution was as follows; PW1 testified that the deceased, her daughter, and the Appellant, were on separation due to violent conduct on the part of the Appellant. On 4<sup>th</sup> March, 2014, around 04:00 hours, the Appellant went to PW1’s house where the deceased was residing. The appellant asked the deceased whether

she was going to the fields. Upon the deceased informing the appellant that she would be going to the field, he then told her to go with a hoe and to get some of the soaked Cassava from the river. The Appellant then informed his wife that he was going for work.

The appellant's wife carried a dish and proceeded to the river. She never returned home. PW1 went to the river to look for her daughter and only found a dish with cassava on the ground. PW1 in the company of other people searched the fields but they did not find the deceased. The Appellant had left his house and was not at his home.

The deceased was found dead the next day in a cassava field belonging to the Appellant and his wife. The body had a cut on the upper side of the chest, near the neck and on the face.

PW2 testified that she had met the deceased on 4<sup>th</sup> March, 2014 at the river. They had proceeded together on their way to their respective fields. She had parted ways with the deceased continuing on to her field.

The testimony of PW3 was that she had seen the appellant on the morning of 4<sup>th</sup> March, 2014 around 08:00 hours walk past her



field. He appeared sick. The appellant informed her that he was unwell, coming from the field and was going to work. He had with him a bottle of local brew called Katubi.

PW4 testified that the deceased had walked past his house on her way to her field on the day of the incident. He had spoken to her in the morning between 06:30 hours to 06:35 hours. Around 17 hours PW1, the mother to the deceased had come to his house and informed him that her daughter had not come back home since morning. PW4 had accompanied PW1 to look for her daughter around 18 hours until it became dark.

Upon being told that the Appellant had earlier been to PW1's house, PW4 went with his brother to look for the Appellant. Though they did not find him home, the appellant's children informed them that he had gone to Mulundu to collect clothes for orphans.

The next day the naked body of the deceased was discovered in the field in a pool of blood; on her chest were two pieces of paper. PW4 read one note, in which the Appellant had allegedly written the reasons why he had killed his wife, namely because of his mother-



in-law. In addition, a TOPAZ razorblade and an Axe were recovered from the scene.

PW5 testified that on 4<sup>th</sup> March, 2014 around 14 hours, he had found the appellant's children crying stating that their father had died as he had taken poison. PW5 was later informed that the appellant had slept in Mulundu. He found the appellant at his mother's place. Upon seeing him the appellant bolted but was apprehended. The appellant informed him that he had run away from him because he had not spent the night at home and had left the children alone. At the hospital the appellant confessed to PW5 that he had killed his wife because of marriage.

It was PW6's testimony that the appellant arrived at his home on 4<sup>th</sup> March, 2014 at around 17:00 hours and had spent the night there. He was very sick, had failed to walk and was complaining of stomach problems. In the early hours of 5<sup>th</sup> March, 2014, the appellant left PW6's home to go back to his village in Kabila.

PW7 testified that the appellant was his workmate and that he did not report for work for two days on the 4<sup>th</sup> and 5<sup>th</sup> of March.

According to PW8, the arresting officer, the appellant was arrested in the bush in Kapotwe Village.

PW9, the handwriting expert testified that he had analyzed samples of the Appellant's handwriting given to him as well as the pieces of paper found on the body of the deceased. His findings were that they were written by the appellant.

The accused did not testify and elected to remain silent.

The trial court convicted the appellant based on circumstantial evidence having found that the same was overwhelming , having taken it out of the realm of conjecture and pointing to an inference of guilt on the part of the appellant.

The Appellant, being dissatisfied with the decision of the learned trial judge appealed against conviction and sentence. Three grounds of appeal were raised namely that;

- 1. The learned trial Judge erred and misdirected himself both in law and fact in convicting the Appellant when the circumstantial evidence on the record permitted other inferences favorable to the Appellant.***

***2. The learned trial Judge erred and misdirected himself when he relied on the evidence of PW5 which was full of inconsistencies and lies.***

***3. The learned trial Judge erred and misdirected himself in law and fact when he placed reliance on the evidence of PW9 when the said evidence fell short of the standard required in criminal cases.***

The Appellant filed into Court heads of arguments dated 8<sup>th</sup> February, 2017. In ground one the Appellant contended that the fact that no eye witness saw the Appellant kill his wife meant that there were other inferences other than that it was the Appellant that had killed his wife. Further, that the time lag from the time the Appellant was last seen with the deceased to the time the body of the deceased was discovered is too large to warrant an inference that it was the Appellant that killed the deceased.

It was argued that there was no hostility between the Appellant and the deceased when they met on the morning of 4<sup>th</sup> March, 2014, a day before her body was discovered. Further, that the Appellant cannot be said to have killed the deceased merely



because he was seen coming from the field. It was added that there was evidence on record to the effect that the Appellant and the deceased had two fields and no evidence was led as to which particular field the deceased was said to have been seen coming from.

The Appellant contended that the trial Judge drew adverse inferences against the Appellant regarding his illness and the fact that he ran away upon seeing a neighborhood officer. The Appellant acknowledged that though odd coincidences if unexplained may be supporting evidence as was held in the case of ***Ilunga Kabala and Joseph Masefu Vs. The People*** <sup>(1)</sup>, the appellant in this case had fully explained the perceived odd coincidences during cross examination. It was the appellant's argument that there were multiple inferences from which the learned trial Judge would have drawn other reasonable inferences such as that the deceased was murdered by someone else. That he did not report for work because he was sick and that he only ran away when he saw PW5 because he had left the children alone the previous night. In respect, of the case of ***Uganda Vs. The Yowara Baptist***

**Kabandize** <sup>(2)</sup> relied upon by the trial judge; Counsel contends that it is distinguishable from the case in casu.

In ground 2, the Appellant in a nutshell argued that the evidence of PW5, the neighborhood officer was full of inconsistencies and was therefore not credible. The Appellant cited several alleged inconsistencies in PW5's version of events some of which are that; PW5's was inconsistent regarding the explanation given by his children when they were found crying. The Appellant also cited PW5's alleged inconsistencies regarding how PW5 began searching for and later apprehended the Appellant even before he got news that the Appellant had committed a crime.

It was the Appellant's contention that PW5 could not have received a confession from the Appellant in the face of evidence on record that the Appellant was badly beaten. Further, that the evidence of PW5 falls short of the required standard in criminal matters on grounds that it was not credible. The trial Judge ought not to have relied on it. We were referred to the case of **Yoani Manongo Vs. The People** <sup>(3)</sup> where the Supreme Court stated that;

**“the evidence of all prosecution witnesses should be tested and if it is found to fall short of the required standard in criminal cases, namely, proof beyond reasonable doubt, an acquittal must follow.”**

In ground 3, the Appellant argued that the absence of a court demonstration chart discredited the evidence of PW9. Further that PW9 confirmed the importance of a Court demonstration chart. The Appellant referred to the case of *Mwewa Muroho Vs. The People* <sup>(4)</sup> where the Court stated that the burden of proving every element of the offense charged in criminal matters lies on the prosecution. The Appellant contended that PW9's evidence did not prove beyond all reasonable doubt that the Appellant authored the documents in question. It was prayed that the Court allows the appeal and quashes both the conviction and sentence.

The Respondent in response to the Appellant's submissions filed heads of argument dated 8<sup>th</sup> February, 2017. In respect to ground 1 the Respondent argued that there was overwhelming circumstantial evidence against the Appellant to support his conviction. Namely that the Appellant and the deceased were on separation, that he had earlier gone to her home. Further that the Appellant was seen coming from the fields and he did not go for



work on the material day despite stating that he was going for work. In addition, that the Appellant did not go to the clinic despite informing PW3 that he was going to the clinic neither did he spend a night at home.

It was contended that the Appellant's actions depicted a guilty mind on his part. Further, the note found on the deceased's body which read that **"I have killed my wife because of my mother in law..."** strengthened the circumstantial evidence against the Appellant thereby taking it out of the realm of conjecture. We were drawn to the attention of the case of **Green Museke Kuyewa Vs. The People** <sup>(5)</sup> in which the Court stated that for circumstantial evidence to be relied upon, it must attain a degree of cogency with only the inference of commission of offence by the accused person.

The Respondent argued that the Appellant did not offer any explanations for the odd coincidences. Further, that the failure to explain the odd coincidences amounted to supporting evidence. As authority, the Respondent cited the case of **Illunga Kabala and Joseph Masefu Vs. The People** <sup>(1)</sup>. In addition, we were further

referred to the case of ***Simutenda Vs. The People*** <sup>(6)</sup> where the Court held as follows;

**“There is no obligation on an accused person to give evidence, but where an accused person does not give evidence the court will not speculate as to possible explanations for the event in question; the court's duty is to draw the proper inference from the evidence it has before it.”**

Reference was also made to the case of ***Kalenga and Another Vs. The People*** <sup>(7)</sup> in which the Supreme Court stated that;

**“Silence in the face of strong evidence strengthens an inference of guilt.”**

In respect of ground 2, the Respondent contended that it was not odd that PW5 was searching for the Appellant as his wife had gone missing and he had abandoned his children. Further, that the admission made by the Appellant to PW5 is admissible as it was made a person not in authority. PW5 a member of the Community Crime Prevention Unit was not a person in authority as defined in the case of ***Abel Banda Vs. The People*** <sup>(8)</sup>. The Respondents' contention was that though PW5 had mentioned the admission made to him by the appellant to the police, the said admission was not reflected in his statement, none the less it amounted to ammunition to test the truthfulness of the witness. We were

referred to the case of ***Miyoba Vs. The People*** <sup>(9)</sup> where it was held that;

**“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.”**

In respect of the alleged inconsistencies in the evidence of PW5 referred to by the Appellant, it was argued by the Respondent that they are immaterial and do not go to the root of the case.

In response to the arguments raised in ground 3 regarding the evidence of the Handwriting Expert, the Respondent argued that the opinion of a handwriting expert is only a guide to the Court in arriving at its decision. The lower court had considered the handwriting evidence as not conclusive and had proceeded to consider it in light of other evidence on record. Further, that the facts in this case are distinguishable from the case of ***Chuba Vs. The People*** <sup>(10)</sup> where the Court’s conviction was based on the evidence of a handwriting expert who had conclusively stated that the handwriting was that of the accused. It was contended that the lower Court had not conclusively stated that the handwriting was



the appellant's but that it was very similar to his handwriting, which evidence strengthened the inference that it was the appellant who wrote the notes.

We have considered the appeal before us, the Judgment of the lower Court, the record of proceedings as well as the authorities cited and the submissions by both Parties.

In respect of ground one, the issue raised relates to circumstantial evidence. Whether it was competent for the lower court to convict the appellant based on circumstantial evidence. In a nutshell, whether the circumstantial evidence was cogent and had taken the case out of the realm of conjecture, permitting the only reasonable inference of guilty to be drawn.

It is trite law that circumstantial evidence by its very nature is not direct evidence as to the commission of the offence. It is proof of facts not in issue but which are relevant to the facts in issue and from which an inference of facts in issue may be drawn by the court. In the case of **David Zulu Vs. The People** <sup>(11)</sup>, the Supreme Court laid down guidelines for trial Courts to follow where the only

evidence linking an accused person to the offence is based solely on circumstantial evidence. They held that;

- "1. 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 fact in issue may be drawn.**
- 2. 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 degree of cogency which can permit only an inference of guilt."**

Therefore, a Court may only rely and consequently convict based on circumstantial evidence if it is overwhelming such that the only probable inference is the guilt of the accused person. In the Supreme Court decision of ***Saidi Banda Vs. The People*** <sup>(12)</sup> it was stated that circumstantial evidence is in many instances probably as good if not even better than direct evidence.

The Appellant argued that the trial Court drew adverse inferences against the Appellant based on circumstantial evidence

when there were other reasonable inferences to be drawn namely that someone else might killed the deceased. Further, that it was not ascertained which field the Appellant was seen coming from since the Appellant and the deceased had two fields. In addition that the time lag between the time that the Appellant was seen coming from the field to the time that that the deceased's body was discovered was too large to draw an inference that it was in fact the Appellant that murdered the deceased. The Appellant had explained that he had ran away upon seeing PW5 because he thought that it was an offence to leave the children on their own at home.

The Respondent on the other hand maintained that the circumstantial evidence against the Appellant was overwhelming to warrant an inference of guilt on his part. Further, that the Appellant did not go for work or to the clinic when he said he would. In addition, that he did not sleep at his home on the night the deceased disappeared. The Respondent went on to argue that the Appellant ran away when he saw PW5, a neighborhood watch officer. It was stated that the Appellant failed to explain the odd coincidences thereby justifying the trial Court's decision to convict the Appellant.



The circumstantial evidence relied upon by the trial Court which is not in dispute is follows;

1. *The fact that the appellant had gone to PW1's home where the deceased was living to inquire whether she was going to the field that day.*
2. *Telling the deceased that he was going for work when he did not report for work for two days on the 3<sup>rd</sup> and 4<sup>th</sup> of March 2012*
3. *The evidence that the children feared him dead as he had taken poison.*
4. *Evidence that he was seen on the 4<sup>th</sup> of March coming from the field by PW3 who he told that he was sick and going to work*
5. *The evidence that the couple were on separation due to the violence on the part of the appellant.*
6. *The evidence that he could not be found at his home on the 3<sup>rd</sup> of March day of the incident. He spent the night in another village at Pw6's home where he complained of severe stomach cramps.*
7. *The evidence by the Handwriting expert, whose opinion was that the notes found on the deceased were written by the appellant.*
8. *The Notes found on the body of the deceased confessing to killing the deceased.*

We are of the firm view that the circumstantial evidence in this matter took the case out of the realm of conjecture and attained a degree of cogency which only permitted an inference of guilt. It was therefore safe for the trial Court to convict the appellant on the strength of circumstantial evidence. We are fortified by the decision in the case of ***Khupe Kafunda Vs. The People*** <sup>(13)</sup> where the Supreme Court opined 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 satisfied that the learned trial Judge drew the right inference based on the circumstantial evidence before him. It is our firm view that the above circumstantial evidence had taken the case out of the realm conjecture such that the only inference to be drawn is that the appellant was guilty of the murder. The entire circumstantial evidence only points to the guilt of the Appellant. It is not in dispute that no one witnessed the Appellant committing the offence of murder. This does not prevent a Court from making a finding that an accused person in fact committed an offence. We

find no merit in the ground raised on circumstantial evidence, as it was cogent, having taken it out of the realm of conjecture.

The next issue to be determined is the malice aforethought; whether it was established.

The appellant argued that there was no motive established as to why he would murder his wife. The record will show that PW1 testified that the deceased's body had a cut on the upper side of the chest, near the neck and on the face. The injuries found on the deceased body were grievous. We refer to the post mortem report indicating the cause of death as due to severe head injury, ruptured spleen plus internal bleeding. By inflicting the nature of such injuries the Appellant ought to have known that death would occur. Therefore malice aforethought as defined under **Section 204 of the Penal Code** had been established. We find no merit in this argument.

In ground two the appellant contends that the court ought not to have taken into account the evidence of PW5 because it was full of inconsistencies and lies. The appellant argued that it was not



possible for PW5 to have started looking for the Appellant before he even knew that the deceased had died.

Counsel further contended that the Appellant could not have made a confession to PW5 as the Appellant had been badly beaten. The respondent argued that the inconsistencies referred to by the Appellant are immaterial and do not go to the root of the case.

We have perused the Record of proceedings particularly the evidence of PW5 appearing at pages 36 to 39. We do not see any inconsistencies as alleged by the appellant. PW5 testified that on the 4<sup>th</sup> of March 2014 around 14 hours, he heard the appellant's children crying stating that their father had taken poison. He proceeded to the appellant's home where he did not find him. PW5 was later informed by someone that the appellant had spent a night in Mulundu. Around 18 hours he heard that the appellant's wife had not returned back from the field since morning. The next day he went in search of a mobile phone network in order to inform the police of a missing person whilst others went searching in the fields for the deceased. On his way PW5 was informed that the appellant was at his mother's place in Kapotwe village. PW5 proceeded to

Kapotwe where he found the appellant, who bolted upon seeing him. When he was apprehended, the appellant said he had run away because he had left the children home alone.

We are of the view that there was no inconsistency in the evidence of PW5 to warrant the court to discredit his testimony. The learned trial court was on firm ground to rely on the evidence of PW5, namely that he heard the children crying that their father had taken poison. Further that the appellant had run away upon seeing PW5 as part of the circumstantial evidence and odd coincidences. We refer to the case of ***Machipisha Kombe vs. The People*** <sup>(14)</sup> where the Supreme Court stated that an odd coincidence constitutes evidence of something more. They represent an additional piece of evidence which the court is entitled to take into account. They provide a support of the evidence of any other witness. PW5's evidence was part of the supporting evidence and not the only evidence relied upon by the Court. We find no merit in ground two and dismiss it accordingly.

In ground 3 the appellant contends that the learned trial judge erred in law and fact by placing reliance on the evidence of PW9 the

Handwriting Expert whose evidence fell short of the standard requirement. The Appellant's contention was that PW9's evidence was not conclusive as he had failed to bring before the trial Court a demonstration chart so as to show the Court how he arrived at the conclusion. It was argued that it was unlikely that the Appellant had authored the notes found on the crime scene.

The Respondent on the other hand argued that despite the handwriting evidence not being conclusive, the evidence of the Handwriting Expert was merely a guide to the Court which is mandated to make its own finding.

It is trite law that the evidence of an expert brought before court in respect of that expert witness' finding is treated as merely his opinion and the court is not bound by it. We refer to the case of ***Shawaz Fawaz and Prosper Chelelwa Vs. The People*** <sup>(15)</sup> at page 13, in which the Supreme Court stated as follows:

**"When dealing with the evidence of an expert witness a Court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the Court to come to its own conclusion based on the findings of the expert witness."**

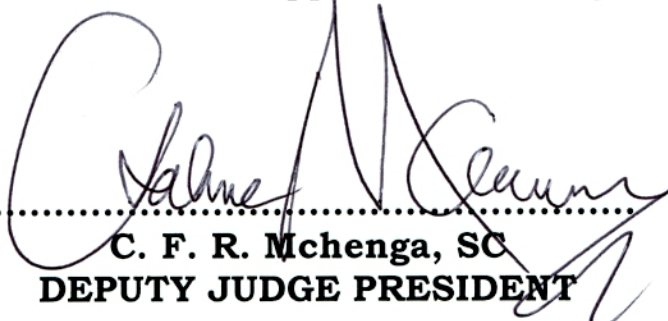



While we agree that demonstration charts are important as the Court is availed an opportunity to follow through the handwriting expert's findings, the Court is also mandated to make its own findings. The trial court found, at page 13 of the Judgment that it was odd that the handwriting similar to that of the accused was found on notes left on the deceased's body.


The handwriting expert evidence was not the sole evidence considered and relied upon by the trial Court. The Learned Judge had considered the evidence holistically. We cannot fault the lower court Judge for considering the expert witness's evidence as an odd coincidence. We refer to the case of **Sithole Vs. The State Lotteries Board** <sup>(16)</sup> in which the Supreme Court held, inter alia, that:

**"The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors."**

We find no merits in all the grounds of appeal raised by the appellant. We accordingly uphold the conviction and sentence passed by the lower Court. The appeal is accordingly dismissed.

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

  
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**F.M. Chishimba**  
**COURT OF APPEAL JUDGE**

  
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**D.Y Sichinga, SC**  
**COURT OF APPEAL JUDGE**