

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

APPEAL NO.32/2017

BETWEEN:

MARON SINKALA

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: Phiri, Muyovwe and Chinyama, JJS.,
on 3rd October, 2017 and on 11th December, 2017.

For the Appellant:

Mrs S. C. Lukwesa, Legal Aid Counsel, Legal Aid Board.

For the Respondent:

Ms G. Nyalugwe, State Advocate, National Prosecutions Authority.

J U D G M E N T

Chinyama, JS delivered the Judgment of the Court.

Cases referred to:

1. *Khupe Kafunda v The People* (2005) ZR 31
2. *Abraham Mwanza and 2 Others v The People* (1977) ZR 221
3. *Kashenda Njunga and 4 Others v The People* 1988-1989) ZR 1
4. *Yokoniya Mwale v The People*, S.C.Z. Appeal No. 205 of 2014

Statutes referred to:

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

The appellant was convicted by the High Court at Kitwe on one count of murder contrary to section 200 of the **Penal Code, Chapter**

87 of the Laws of Zambia in that he, on the 1st January, 2012 at Chingola murdered his wife, Edina Makaliki. He was sentenced to death for the crime. This appeal is against conviction and sentence.

The material evidence supporting the conviction came from PW2, the mother to the deceased; PW3, the father to the deceased; PW4, a neighbour to the deceased; and PW5, the arresting officer who produced the post-mortem report which disclosed the cause of death. PW1 merely identified the body to the pathologist at the post-mortem examination.

The evidence was that the deceased used to live at her father's farm with the appellant. PW2's home was some 150 metres away. PW4 lived further on but nearer to PW2's home. In the night of 29th December, 2011 around 19:00 hours, PW2 heard the deceased crying out aloud (in Cibemba language): "*mayo, mayo, nafwa*" meaning "*mother, mother, I am dying.*" PW4 also heard the distressed cries. The cries went on for about 15 to 20 minutes. PW2 went to the deceased's homestead. Upon arriving, she called out to the deceased. The deceased emerged from the house and told the mother that the appellant had beaten her. The deceased had an injury on the side

of the face. The face was swollen and the eyes were red. The deceased also complained that the appellant had bitten her finger which the witness saw and that she was experiencing a headache, pain in the waist and the back. The witness reprimanded the appellant for beating the deceased who had, not long ago on 18th December, 2011, given birth to their second child.

The appellant told PW2 that the cause of the fight was that the deceased had not cooked supper. PW2 took the deceased with her to her home. The next day the deceased continued to complain that she was not feeling well. She was eventually taken to Nchanga North Hospital where she died on 1st January, 2012. PW2 stated that the deceased had never suffered from fits. On her relationship with the appellant, PW2 stated that she did not get along with him but that she did not hate him and used to treat him as a son-in-law.

PW4 saw the deceased the next morning. The deceased complained that she was feeling unwell after being severely beaten by her husband. The witness saw bite marks on the deceased's right finger. She denied that the deceased had complained of malaria prior to her death or about any complications after the birth of her second

child. She stated that she did not get along with the appellant and that she hated him.

PW3, the ex-husband to PW2, visited the deceased at PW2's home, the following day. The deceased told him, upon inquiry, that she had been beaten by her husband. He saw a bite mark on the deceased's right hand. The deceased complained that she was experiencing pain around the head and the ribs. The witness denied that the deceased had malaria. He said that at the hospital the deceased was given an injection but the doctors suspected that the medicine might not have worked because of complications arising out of child birth. He admitted that the medical personnel complained that the deceased was taken to the hospital late. He denied, however, that medical personnel said that the medicine they were administering was for malaria.

PW5 attended the post-mortem examination conducted on the body of the deceased on 5th January, 2012. He noticed blood coming out of the nose and that the deceased's forehead was swollen. He said that the pathologist told him that the deceased died because of brain damage. The witness secured the post-mortem report. A

perusal of the post-mortem report showed that the significant findings recorded by the pathologist were: a swollen head; blood coming from the nose; subcutaneous haemorrhage patches in the scalp; small haematomas in the chest and neck muscles; and (blood) clots in the subdural space. The officer stated that the appellant told him that his wife had suffered from malaria.

In his defence the appellant testified that the deceased had a history of suffering from malaria, especially after the birth of their first child. He told the court that on the material day, he returned home around 20:00 hours and found his wife sleeping. She told him that she was not feeling well. He inquired whether the children had eaten. The deceased told him that she had taken them to their grandmother, PW2, because she did not have the energy to cook. Her sister refused to help her. The appellant said he complained to the deceased about the conduct of her relatives and also about giving away things to people who were never willing to help her at all. He then told the deceased to stop visiting her mother's farm. The deceased retorted that he could not stop her from visiting her mother and that it would be better for her to go (and live) in her parent's

house. She tried to go but he stopped her. Later, he heard PW2 calling the deceased by name and asked what was going on. She told him that she had heard the exchange between him and the deceased and that he could not stop the deceased from visiting her and declared that she was taking away her daughter. They went away. He denied beating the deceased that night or that he was drunk as he never took alcohol.

The next day the appellant visited the deceased at PW2's home and found her lying down. He tried to borrow money to take his wife to the hospital but was not successful. The next day, he again went to see the deceased and found her vomiting. Later the deceased's father hired transport and took her to the clinic where she was referred to the hospital. According to the appellant, the nurse blamed the deceased's parents for delaying in taking the deceased for medical attention and learnt that the deceased was diagnosed with cerebral malaria and was fitting (convulsing).

The appellant stated that he never got along well with PW4; that she used to rebuke him for mistreating his wife. He said that the

doctor's findings and PW2's evidence were not consistent with a person that had died from beatings.

In his judgment the learned trial judge found, on the basis of the post-mortem report, that the deceased was "*unmercifully beaten up*." He believed PW2's and PW4's testimonies, whom he regarded as credible, that they heard the deceased's screams for help, and that this circumstantial evidence strongly connected the appellant to the injuries found on the deceased which even PW3, the deceased's father, saw when he visited his daughter at PW2's home. The case of **Khupe Kafunda v The People**¹ was relied upon where this court upheld a conviction for murder on the basis that the circumstantial evidence was strong and overwhelming in the absence of direct eye witness evidence of the incident that led to the death of the deceased. He found corroboration for PW2 and PW4 in the post mortem report.

An appeal was launched to this court on behalf of the appellant on the single ground that the trial court erred in law and fact when it failed to consider other inferences that would warrant an acquittal of the appellant.

Mrs Lukwesa on behalf of the appellant submitted to the effect that there was evidence that the deceased was treated for malaria at the hospital; that the medicine might not have worked because of complications arising from giving birth as well as the delay in taking the deceased to the hospital; that the child birth complications and cerebral malaria could cause the deceased to fit; that in fact PW2 and PW3 had confirmed that the deceased had been sick. All the foregoing was in an effort to show that the deceased may have sustained the traumatic fatal injuries as a result of fitting. Counsel submitted, therefore, that the doctor who attended to the deceased before her death should have been called to rule out the possibility of other causes of death. The case of **Abraham Mwanza and 2 Others v The People**² was cited in which this 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; that it is highly desirable except perhaps in the simplest of cases for the person who carried out the examination in question and prepared the report to give verbal evidence in the court.

Counsel also pointed out the discrepancies between the evidence of PW2 who said the deceased died on 1st January, 2012 and that of PW3 who, according to counsel, gave the date of death as 3rd January, 2012. Further, that the alleged bite marks on the finger, the swelling of the deceased's head and blood coming out of the nose or indeed injuries on the body were not confirmed in the post-mortem report.

The credibility of PW2, PW3 and PW4 was also assailed on the point that the first two were parents of the deceased and that PW4 had confessed to hating the deceased. Therefore, that all three were suspect witnesses in that they could have possible motives to embellish their stories to the detriment of the appellant, a matter which the lower court did not deal with, as we understood the submission. We were urged to find that the appeal succeeded on the basis that an inference favourable to the appellant was not excluded.

Ms Nyalugwe's reply on behalf of the State was to the effect that the medical report was categorical on the cause of death, that is to say, subdural haemorrhage, arising from an assault without a *novus actus interveniens* (Latin for 'a new act intervening'). She submitted

that there was no evidence whatsoever that the deceased had been afflicted with and was treated for malaria. Counsel was of the position that there was no need to call the doctor as the post mortem report was adequate. She referred to the case of **Kashenda Njunga and 4 Others v The People**³ in which this court said that-

It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Except in borderline cases, laymen are quite capable of giving evidence that a person has died. Where there is evidence of assault followed by a death without the opportunity for a novus actus interveniens, a court is entitled to accept such evidence as an indication that the assault caused the death.

On that basis counsel submitted that there was no need for the trial court to consider other inferences when it was clear, as we understood the submission, as to what was the cause of death. Counsel also referred to the case of **Khupe Kafunda v The People**¹. It was submitted, therefore, that the circumstantial evidence of PW2 and PW4, corroborated by the post-mortem report, took the case out of the realm of conjecture leaving only the one inference that the appellant was responsible for the deceased's death. Further, that the appellant, by his own evidence placed himself at the scene when he

confirmed that he was confronted by PW2 whom he told that he had quarrelled with the deceased over her refusal to prepare supper.

Regarding the credibility of the three prosecution witnesses, counsel submitted that the testimony of PW2 and PW4 corroborated each other in that they all confirmed hearing the deceased screaming at about the same time. Counsel conceded that the trial court failed to warn itself of the danger of relying on the uncorroborated evidence of these witnesses including PW3; the two parents because of their relationship with the deceased and PW4 because of her self-confessed hatred for the appellant. Counsel, however, submitted that the omission was not fatal because had the court complied with the requirement as to the warning it would have arrived at the same conclusion. It was submitted that the injuries sustained by the deceased and the report which the deceased had made about who had assaulted her is evidence of something more which corroborates the occurrence of the events in this matter. Counsel concluded that the trial court was on firm ground when it convicted the appellant on the circumstantial evidence which was overwhelming.

We have considered the evidence and the judgment of the court below. The issue for decision, arising from the one ground of appeal, is indeed whether any other inference besides that of the appellant's guilt could be made based on the evidence put before the trial court. None of the witnesses who testified for the prosecution saw the appellant beat up the deceased. The conclusion by the lower court that the cause of death recorded in the post-mortem report, i. e. subdural haemorrhage, was a result of beating was based on circumstantial evidence.

It is indeed the law that in the absence of direct evidence, circumstantial evidence is capable of supporting a conviction as long as it is of such cogency that it takes the case out of the realm of conjecture leaving only the inference of guilt. We have said this in many cases including that of **Khupe Kafunda**¹ cited by Mrs Lukwesa.

On the issue whether an inference can be drawn that the deceased may have inflicted the fatal injuries upon herself while fitting, we have combed the evidence on record and the judgment of the court below and find no support for the assertion. In the first place there was no evidence whatsoever that the deceased actually

fitted on any of the days prior to her death. There was no evidence that the deceased fitted at her home or at her mother's home before she was taken to the hospital. Secondly, even if we accepted that medicine was administered to the deceased and it failed to work because of child birth complications and that the deceased was delivered for medical attention late, there is still an absence of a clear cause and effect of a medical trail confirming the suggestion that the deceased may have died as a result of any of those conditions. The evidence provided in the medical report was that the deceased died from injuries to the brain. This evidence and finding has not been displaced.

Our view is that the arguments on behalf of the appellant amount to mere speculations which are not supported by facts. A court should not be led to indulge in speculation not based on established facts which has the tendency of resulting in the drawing of unreasonable and unfounded inferences. In the circumstances, we are unable to accede to the argument that the appellant may have met her death in connection with fitting and/or having suffered from malaria or any child birth complications.

It has been contended that the doctor who attended to the deceased before her death should have been called to explain the deceased's condition. We do not agree with the submission. There was no obligation on the prosecution to call the doctor. The prosecution's case is clearly that the deceased died as a result of the traumatic injuries recorded in the post-mortem report. The report does not say anything about malaria or fitting. If the defence saw the need to explain the deceased's condition and treatment before her demise, it was always at liberty to call that evidence in defence. Otherwise, the post-mortem report was quite clear as to the cause of death and did not need explaining in the manner suggested in the **Abraham Mwanza**² case. We reiterate, therefore, that the prosecution was, on the facts of this case, under no obligation to call the doctor for the purposes suggested by Mrs Lukwesa.

The next issue is to do with the discrepancies in the date of death noted by counsel for the appellant. As we see the issue, it was meant to demonstrate inconsistency in the evidence of the prosecution witnesses. Ms Nyalugwe did not respond to this part of the submissions. Be that as it may, we regard the issue as being of

little significance in the circumstances of this case. The undisputed fact is that the deceased died after complaining of not feeling well for some time following the encounter with her husband. The foregoing notwithstanding, our perusal of the record of the evidence of PW3 does not show anywhere that the witness stated the date when the deceased died. He merely explained the events leading up to the demise of the deceased. We accordingly find no material discrepancy in the witnesses' testimony on the date the deceased died.

We turn now to the submission that PW2, PW3 and PW4 had motives to give false evidence against the appellant because of their relationship with the deceased on the part of PW2 and PW3 and because of hatred for the appellant on the part of PW4. This court has clarified in the recent decision of **Yokoniya Mwale v The People**⁴ that **"A conviction will ... be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or the victim provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is**

key is for the court to satisfy itself that there is no danger of false implication”.

The court below, in this case, did not specifically assess the evidence of PW2, PW3 and PW4 to determine whether indeed each one of them harboured any bias or an interest of their own to serve, or a motive to falsely implicate the appellant. On the evidence on record it is, however, clear that PW2's story is confirmed by the appellant himself that she did go to the deceased's home on the night in question clearly prompted by the cries for help by the deceased. The appellant also confirmed that he had a quarrel with the deceased and did not deny that his wife cried out when he was with her that night to the extent that PW2 who lived 150 meters away had to go and find out what was happening. PW4's evidence is likewise confirmed that she heard the deceased's distressed cries at about the same time as PW2. All three witnesses testified that the deceased complained of having been beaten by the appellant and that she was unwell which led to her being taken for medical attention. The appellant again did confirm that the deceased was unwell on the days after she left their home. He, of course, tried to attribute this to

malaria which we have already discounted. But even if the deceased was suffering from malaria, it cannot assist the appellant because the evidence does not show that the reason for crying out was the malaria. The reason was that the deceased was being beaten. It is, thus clear from the foregoing that the relationship between the three witnesses and the appellant or the avowed hatred between PW4 and the appellant did not influence the witnesses' testimony. We are satisfied that if they were influenced at all, it was by the desire to candidly report what they heard and saw. We find no evidence of bias or other untoward interest in the evidence of the three witnesses. All we see is weighty overwhelming circumstantial evidence which supports the only inference that the deceased was beaten by the appellant.

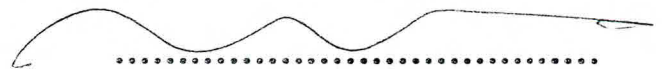
We are of the view that the condition of the deceased which the witnesses saw soon after the alleged beating is confirmed by the findings in the post-mortem report which were consistent in the circumstances. In other words the post-mortem report corroborates the evidence of each one of the three witnesses that the deceased was beaten and that it was the appellant who beat her. In fact, although

the trial court did not record the warning as we have already stated, it did make a finding to the effect that the fact that the appellant was with the deceased clearly connected him to the injuries found on the deceased and we agree. There is no possibility that the fatal injuries could have been sustained in any other manner. Certainly, not from fitting as there is no evidence that the deceased ever fitted. As such the danger of false implication is removed. We dismiss the appeal and sustain the conviction.

As to the sentence there is no evidence whatsoever indicative of extenuating circumstances that would mitigate the sentence. We, accordingly, confirm the sentence of death imposed by the court below.



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G.S. PHIRI
SUPREME COURT JUDGE



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E.N.C. MUYOVWE
SUPREME COURT JUDGE



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J. CHINYAMA
SUPREME COURT JUDGE