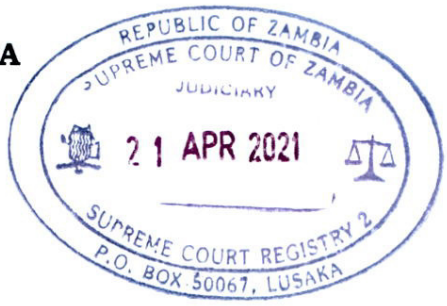
IN THE SUPREME COURT OF ZAMBIA **SCZ Appeal No. 01/2021**

HOLDEN AT KABWE

(Criminal Jurisdiction)

B E T W E E N :

FELIX MWAPE MULUMBA **APPELLANT**



AND

THE PEOPLE **RESPONDENT**

Coram: **Hamaundu, Malila and Kaoma, JJS**
On 13th April, 2021 and 21st April, 2021

For the Appellant: Mrs. M.K. Liswaniso, Senior Legal Aid Counsel - Legal Aid Board

For the Respondent: Ms. O. Muvwende, Senior State Advocate - National Prosecutions Authority

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J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *David Zulu v. The People (1977) ZR 151*
2. *Peter Yotamu Hamenda v. The People (1977) ZR 184*
3. *Yoani Manongo v. The People (1981) ZR 152*
4. *Chabala v. The People (1976) ZR 14*
5. *Saidi Banda v. The People (Appeal No. 144/2015)*
6. *Chimbini v. The People (1973) ZR 19*
7. *Robson Kapulushi, Webby Kanyakula, Frankson Kapulushi and Watson Masikuni v. The People (1978) ZR 200*
8. *P. L. Taylor & Others v. R (21 Cr. App. R 20)*

1.0. INTRODUCTION

1.1. The circumstances from which this appeal arises are in truth paradigmatic of gender based violence escalated to an incredibly intolerable level. It involves a husband and a wife whose matrimonial union seems, from the evidence given by, among others, their own daughter, to have been anything but happy.

1.2. Amidst the reported unhappiness that animated the marriage, the deceased, who was wife to the appellant, was on the afternoon of 2nd February, 2013 found dead in the matrimonial house. An autopsy revealed the cause of death to be asphyxia and brain hemorrhage due to strangulation.

1.3. The suspected culprit was the now appellant who was arrested, and in due course tried by Mulanda J of the High Court. Despite the absence of any direct evidence of his involvement in the murder, he was convicted and sentenced to suffer the death penalty.

1.4. Notwithstanding the conviction, the prisoner continues to protest his innocence and has thus appealed to this court.

2.0. BACKGROUND FACTS

2.1. The appellant and the deceased had, as at the time of the deceased's death been husband and wife for some twenty years, residing at Chifwile Village, Chief Shimumbi in Luwingu District of Northern Province of Zambia. Their marriage had yielded seven children.

2.2. The deceased died in her house in the late afternoon of the 2nd February, 2013. As intimated already, the cause of death was medically determined to have been asphyxia resulting in brain hemorrhage and other complications.

2.3. There was, however, no direct evidence adduced at trial as to who strangled the deceased. What was available, nonetheless, was clear evidence that the appellant was the last person to see the decease alive – or put more accurately, the first person who saw her dead, and the circumstances surrounding her death were suggestive of villainy.

2.4. He was arraigned for her murder and subsequently, convicted and sentenced to death.

2.5. The evidence against him was given by six prosecution witnesses namely, Margaret Kasaka, the deceased's elder sister; Gladys Mwape, his own daughter (then aged 19); Romano Bwalya, a member of the Community Crime Prevention Unit (CCPU) (Neighbourhood Watch); Abel Chomba, the deceased's brother; Hedson Sakala, Detective Chief Inspector; and Dr. Enerst Chama of Luwingu District Hospital. None of these was an eye witness to the murder.

2.6. The narration by the prosecution's witnesses was that in the months preceding the deceased's death, she had complained to her elder sister, Margaret Kasaka, that she was experiencing physical and psychological torment from the appellant, her husband, who had, on diverse occasions, threatened to kill her. He had repeatedly intimated that he intended to marry another woman. This evidence matched that given at the trial of the appellant by his daughter, Gladys Mwape.

2.7. Unsettled by the prospects of being murdered, and given the generally dim matrimonial outlook, the deceased left the appellant at the village in Luwingu and repaired, together with her youngest child, to her elder sister's home in Lusaka in the hope that this would give the appellant (then husband) time to 'cool off.'

2.8. The appellant was, however, not quiescent. He repeatedly telephoned the deceased's sister and demanded the return to Chifwile Village of the deceased and his child on a transport pay-forward arrangement. The deceased eventually heeded the demands and returned to Luwingu on or about the 26th January, 2013.

2.9. Barely a week after the deceased's return to Chifwile Village the appellant and the deceased, along with other family members, had a discussion in a shelter at their village. As it began to rain, the deceased rushed into her house to secure family clothes against wetness through a leaking roof.

2.10. In no time, the appellant trailed the deceased into the house, on the pretext that he was going to get himself some warm clothing. A very short while later (estimated by one prosecution witness as 1 minute later), the appellant emerged from the house, on to the veranda, 'fidgeting' with his mobile phone. He went into the house a second time and came out after another short while. An announcement was shortly thereafter made by the appellant that the deceased had committed suicide.

2.11. The deceased, who was reported to have been in fairly good health on that day, was found lying lifeless in the passage to the bed room of her house. She was said to have been about 1.7 meters tall.

2.12. The explanation by the appellant that she had committed suicide by hanging herself to a pole support of the roof of their house, measuring approximately 1.3 meters from the floor, was disbelieved by all who heard his narrative - not least, the medical doctor who conducted the autopsy on the deceased.

2.13. The post-mortem examination on the deceased was conducted by a forensic pathologist, Dr. Brian Chibosha, who at the time of the trial was outside the country pursuing further studies. The report was produced in court by Dr. Enerst Chama.

2.14. The results of the autopsy were entirely at odds with any notion that the deceased had committed suicide. The appellant's narrative having been rejected by the judge, the conclusion was drawn by the lower court that, notwithstanding the lack of direct evidence, the circumstantial evidence available, allowed no other reasonable inference to be made than that the appellant had murdered the deceased.

2.15. The court thus found that, on the evidence as presented to it, the appellant had killed the deceased. It accordingly convicted him and sentenced him to death. He has now appealed against conviction.

3.0. GROUNDS OF APPEAL

3.1. One ground of appeal was filed. Couched in a verbose sentence, the ground reads as follows:

> **The trial court erred in law and fact when the court found that the circumstantial evidence brought to light by the prosecution coupled with the post-mortem examination report had taken the case out of the realm of conjecture and had attained such a degree of cogency which can only permit an inference of guilt on the part of the appellant.**

3.2. It was around this one ground of appeal that Mrs. Liswaniso's heads of argument were directed. She also supplemented the heads of argument by some oral submissions.

4.0. THE APPELLANT'S CASE ON APPEAL

4.1. The learned counsel for the appellant chiefly anchored her argument on the evidence by PW2, Gladys Mwape, elicited in cross-examination. Pointing us to the transcript of proceedings in the court below, particularly to the evidence of the witnesses, counsel highlighted PW2's evidence that the appellant had spent approximately one minute in the house after he followed his wife, and that during that period the

witness did not hear any noise suggestive of a quarrel emanating from the house.

4.2. The learned counsel stressed the fact that not only did PW2 confirm that she did not perceive any altercation or squabble in the house when the appellant and the deceased spent the two brief periods together in the house, she also testified that on that day she did not witness any feud involving them.

4.3. In her submission, Mrs. Liswaniso invited us to examine two passages in the judgment of the trial court one of which reads as follows: [at J.27]

> **Considering the evidence of PW6, Dr. Brian Chibosha, that for proper breathing of a person, the hyoid bone must be intact, and that any tempering with this bone results in shortness of breath in the person and results in asphyxia, the length of time that the accused was in the house with the deceased is irrelevant.**

4.4. To an intent not immediately clear to us, she also quoted the following passage from the lower court judgment: [page J.30]

> **In the case at hand, while I agree with the defence that the investigating officer did not fully investigate the case in that he neglected to interview the other people who were at the accused's house, I cannot say the accused was seriously prejudiced, because he admitted that he was the only person**

who entered the house while the deceased was there before she met her death.

4.5. Counsel submitted that given the evidence of PW2, which she highlighted, and given also that the deceased was, as per post-mortem report, found to have had grave injuries, it is impossible for the appellant to have inflicted the injuries on the deceased in one minute.

4.6. More solemnly, Mrs. Liswaniso argued that the inference that the appellant inflicted the fatal injuries on the deceased was not the only possible inference to be drawn from the prosecution's evidence. According to the learned counsel, another inference that could be made is that one of the 13 people that had gathered for a meeting just before the deceased met her fate, could have inflicted those injuries.

4.7. Arising from her submission regarding other possible inferences, the learned counsel posited that it was imperative that the arresting officer should have interviewed everyone that was near the deceased's homestead at the time the deceased met with grief. Counsel called the arresting officer's failure to interview those around 'as dereliction of duty'

which, in the circumstances, ought to be resolved in favour of the appellant.

4.8. On a portentous note, Mrs. Liswaniso also submitted that the explanation given by the appellant on how the deceased could have met her fate was reasonably true and there was no onus on the appellant to prove his explanation.

4.9. As regards case authorities to support the bold submissions which she made, Mrs. Liswaniso cited the case of **David Zulu v. The People**[1], and reproduced the often-quoted dicta that circumstantial evidence is typified by the absence of direct evidence and depends on inferences to be drawn from circumstances. Above all this, she reiterated the warning we gave in the **Zulu**[1] case that it is incumbent upon a trial judge to guard against the risk of drawing wrong inferences and further that the judge ought to be content that the circumstantial evidence transcends or snowballs the case out of the realm of speculation so that the sole inference that is reasonable to make in the circumstances is that of guilt on the part of the accused person.

4.10. Counsel also cited the case of **Peter Yotamu Hamenda v. The People**[2] in regard to the consequences of failure by the police to undertake investigation that the nature of a given criminal case necessitates; that dereliction of duty to investigate an issue which in effect prejudices an accused person's position will, in appropriate circumstances, operate in favour of the accused person and should result in an acquittal.

4.11. Counsel also adverted to the case of **Yoani Manongo v. The People**[3] where we held that the evidence of all prosecution witnesses ought to be tested against the criminal law standard of beyond reasonable doubt if it is to muster sufficient credence to support a conviction.

4.12. Finally, counsel referred us to the case of **Chabala v. The People**[4] where we stated that where guilt is a matter of inference and an explanation given by an accused person might reasonably be true, then guilt is not the only reasonable inference.

4.13. On the basis of all the foregoing submission, the learned counsel for the appellant prayed that we uphold the appeal.

5.0. THE RESPONDENT'S CASE ON APPEAL

5.1. With our leave, Ms. Muvwende, learned counsel for the respondent, was at the hearing of the appeal allowed, for good reasons given, to file the respondent's heads of argument out of time. She chiefly relied on those heads of argument.

5.2. It was submitted that although the evidence upon which the appellant was convicted was circumstantial, the lower court judge was on firm ground to convict the appellant as the evidence was overwhelming. She found solace in a statement in our judgment in **Saidi Banda v. The People**[5] where we observed that:

> **Notwithstanding its [circumstantial evidence] weakness as we alluded to in the *David Zulu*[1] case, it is in many instances probably as good if not even better than direct evidence.**

5.3. Counsel cited the case of **Chimbini v. The People**[6] where we explained that where evidence against an accused person is purely circumstantial, guilt may not be drawn unless that is the only inference which can reasonably be drawn from the

facts. In the present case, the inference of guilt was, according to the respondent's learned counsel, the only one to be drawn from the circumstances.

5.4. After recounting portions of the evidence of PW1 and PW2 on the physical and psychological difficulties that the deceased endured as wife to the appellant – in other words the physical and emotional abuse, counsel submitted that the appellant had shown a clear motive to kill the deceased. This, according to the learned counsel, was clearly revealed in the evidence of the appellant's own daughter who testified as PW2 when she told the court that:

> **My father used to say it himself that I want to marry another one and you should leave this house so that I can remain with the other woman.**

5.5. Ms. Muvwende dispelled the submission that someone among the 13 people present outside the appellant's house could have committed the murder, pointing out that the evidence which the appellant himself confirmed shows that no other person entered the house after the deceased other than the appellant himself. The only inference, therefore, is that the appellant is the only person who could account for

what happened to the deceased in the house. Evidence showed that the injuries on the deceased were not self-inflicted. Rule out suicide and confirm homicide, leaves the appellant in a bad place.

5.6. On the argument around dereliction of duty, counsel admitted that there may have been 'some incongruous omission' on the part of the police to record statements from persons who were near the crime scene, but that the court was nonetheless on firm ground to convict the appellant as the available evidence was overwhelming – in fact so overwhelming as to offset the prejudice that might have arisen from any such dereliction of duty.

5.7. For the submission that dereliction of duty will not operate in favour of the accused so as to result in an acquittal where the evidence given for the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction, the learned counsel found solace in our dicta in the cases of **Peter Yotamu Hamenda v. The People**[2] and **Robson Kapulushi, Webby Kanyakula, Frankson Kapulushi and Watson Masikuni v. The People**[7].

5.8. We were on the basis of these submissions implored to dismiss the appeal for lacking merit.

6.0. OUR ANALYSIS AND DECISION

6.1. We have scrupulously examined the documents on the record of appeal and the submissions of counsel for the opposing sides and are grateful for their efforts.

6.2. The chain of events leading to the fate that befell the deceased is, in our view, clear. The factual matrix is not controverted. That the deceased had suffered despicable domestic abuse at the hands of the appellant was, on the evidence before the court, quite firmly established and so was the fact that the deceased and the appellant were alone in the house when the death occurred.

6.3. There can be no debate whatsoever that the evidence upon which the appellant was convicted was circumstantial. In other words, there was no eye witness to the murder. It is in these circumstances that we view the real question for determination in this appeal as being whether the circumstantial evidence as presented before the court

reached the threshold necessary to justify the inference of guilt that the trial judge made.

6.4. The law on circumstantial evidence has been restated time and again in the many decisions of this court. It is in a nutshell this, that in order to convict on the basis of circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused person and must also be incapable of explanation upon any other hypothesis than that of his guilt.

6.5. There is, of course, little point in repeating the lamentation we made in **David Zulu v. The People**[1] regarding the peculiar weakness of circumstantial evidence. As we stated in **Saidi Banda v. The People**[5] we are sympathetic and do in fact subscribe to the view laconically expressed by Heward CJ [as he then was] in **P. L. Taylor & Others v. R**[8] that circumstantial evidence is often the best:

> **It is evidence of surrounding circumstances which by undersigned coincidences is capable of proving a proposition with the accuracy of mathematics.**

6.6. We ask the question what the actual circumstantial evidence in this case was from which inferences could be drawn and furthermore, whether there were other inferences other than that of guilt that Mrs. Liswaniso insisted could possibly be drawn from the circumstances.

6.7. At the risk of repetition, we recap the relevant facts from which the inference of guilt was made. The deceased was reported to have been in good health on the day she died. At about 1.7 meters tall, she was giant-size, certainly above the average height for village women in Zambia. In fact, she had to bend over slightly to enter her house. There were about 13 people outside her house in a shelter. She walked into the house with the appellant trailing her.

6.8. Something happens in the house. The appellant emerged from the house one minute later and spent time on his mobile phone. He walked back in for another little while before he walked out again. He made the announcement that the deceased had committed suicide. He was all this while the only person who had walked in and walked out of the house where the deceased had entered.

6.9. The circumstances in which the deceased died were observed by those who went in to see the body of the deceased. There was no intimation whatsoever that the deceased could have committed suicide as announced by the appellant. More solemnly, medical evidence following the post-mortem on the deceased's body, ruled out suicide altogether, but specified strangulation as the cause of death.

6.10. The learned judge made an inference based on these circumstances that the appellant had caused the deceased's death. The learned counsel for the appellant, however, believes that the alternative inference that could have been made is that one of the 13 people that were near the matrimonial house inflicted the injuries on the deceased that accounted for her death.

6.11. In the case of **Saidi Banda v. The People**[5], which was referred to by both counsel, we took time to explain the responsibility cast upon a trial judge faced with the difficult task of determining whether or not an accused person is guilty based on circumstantial evidence. We stated in that case that:

Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that, those further facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning.

6.12. We have attempted to fit the lower court judge's approach to the suggestion we made in **Saidi Banda**[5] which we have set out in the preceding paragraph. We are satisfied that in this case the court did find that the prosecution's case did establish certain basic facts, namely, that the deceased walked into her house followed by her husband, the appellant. There was no other person in the house. With her height and size, the deceased could not have hanged herself to the pole in the house as alleged by the appellant. These basic facts needed not be proved beyond reasonable doubt. For example, it was not necessary to produce empirical

evidence that a 1.7-meter woman could not have committed suicide in those circumstances, or that the appellant had spent approximately one minute in the house.

6.13. Taken by themselves, the facts that the deceased walked into the house and was followed by her husband as well as the circumstances in which she was found dead could not prove the guilt of the appellant. The court then inferred or concluded that from those facts which were established, that a further fact or facts existed. That further fact was that someone strangled the deceased to cause her death in a manner that was consistent with the findings recorded in the post-mortem report and the witnesses' account of the state of the deceased's body when it was seen where it lay in the house.

6.14. Those further facts did, in the view of the court, implicate the appellant as they pointed to nothing else but his guilty. Why? The appellant and the deceased were alone in the house when the strangulation happened. The nature of the killing entails that someone else had done it. The only other person who was present and had the opportunity was the appellant. The

court then drew conclusions from the set of established facts to find that the other set of facts – as to who strangled the deceased – were proved.

6.15. In our view, the approach used by the court to come to the conclusion that she did was both logical and rational. Despite her insistence, we do not thus accept Mrs. Liswaniso's submission on this point.

6.16. As regards the spirited submission that Mrs. Liswaniso made that there was dereliction of duty on the part of the investigating officer in failing to interview the 13 persons that were in the vicinity of the house, all we can say is that in the circumstances, any such investigations could at best be fanciful as the investigator would have the answer to the question in the inquiry staring him right in his face. The question in the inquiry would be: which one of the 13 persons could have strangled the deceased. The answer, readily available on the evidence adduced without the need for that investigation, is that none of the 13 was in the house where the death occurred; none had the opportunity which the appellant had; and none therefore could have done it. Our

view is that an investigation is not a witch-hunt, literally or metaphorically.

6.17. In any event, the passage which the learned counsel for the prisoner quoted from the case of **Peter Yotamu Hamenda v. The People**[2], instructively goes against the tide of her submission. In that case, the court stated that:

> **Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty** (underlining ours for emphasis)

6.18. Our view is that, the investigation of the 13 people was on the facts unnecessary. Even assuming it were, the evidence given on behalf of the prosecution was so overwhelming as to offset any prejudice which could have arisen from such dereliction.

6.19. We stated at the beginning of this judgment that this case typifies gender-based violence which many women quietly endure in marriage settlings. We deplore this vice in all its manifestations and condemn, it all the more so where, as in this case, it resulted in the death of a mother of seven children.

6.20. The appeal has no merit and it is hereby dismissed. The judgment of the lower court is thus upheld.

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE