

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

SCZ Appeal No. 06/2021

B E T W E E N :

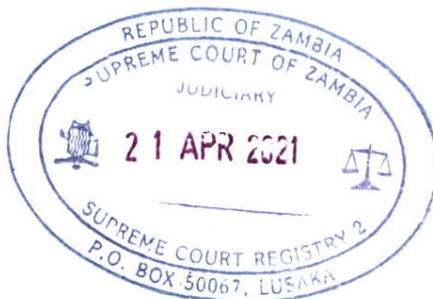
SIYOTO SIKOTA

Appellant

AND

THE PEOPLE

Respondent



Coram: Hamaundu, Malila and Kaoma, JJS

On 14th April, 2021 and 21st April, 2021

For the appellant: Mrs. L. Zulu-Musonda, Legal Aid Counsel – Legal Aid Board

For the respondent: Mrs. M. Chipanta-Mwansa, Deputy Chief State Advocate – National Prosecutions Authority

J U D G M E N T

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Nicola Malaya v. The People* (SCZ Appeal No. 29 of 2017)
2. *David Zulu v. The People* (1977) ZR 151
3. *Naweji v. The People* (1981) SJ, drawn from Hatchard, J & Ndulo, M. *The Law of Evidence in Zambia* (Printech, Lusaka 2013)
4. *Saidi Banda v. The People* (Appeal No. 144/2015)
5. *Dorothy Mutale and Richard Phiri v. The People* (1997) SJ 51
6. *Green Musheke Kuyewa v. The People* (1995-97) Vol. 1 ZR 126
7. *Joseph Banda and Ashanti Tongo v. The People* (Appeal No. 41 & 42/2017)

1.0. INTRODUCTION AND BACKGROUND FACTS

- 1.1. The appellant, a herbalist, was convicted by the Mongu High Court (Sikazwe J) for the murder of his lover and sentenced to death. He has appealed to us against conviction.
- 1.2. The specifics of the charge against him were that between the 19th and the 20th of December, 2013 at Kazauli village in Sikongo in Western Zambia, he murdered Nanjila Sililo, a woman with whom he shared a romantic extra marital relationship.
- 1.3. The case for the prosecution was constructed from the evidence of six witnesses of fact, most of whom had spent part of the day or evening preceding the death of the deceased with the appellant and the deceased, or had seen both or either of them.
- 1.4. Beside the appellant, the deceased had another lover by the name of Kapunya, who was the grandfather of Sitali Simangolwa who testified as the second prosecution witness (PW2).

- 1.5. The narrative of the prosecution, which was believed by the trial court, is that PW2, Sitali Simangolwa, had a conversation with Kapunya who had gone to his home around 18:00 hours on the 19th December, 2013. Kapunya was in a drunken state and was in the company of his lover – the deceased.
- 1.6. He asked for a place to sleep whereupon PW2 took Kapunya and his lover to Machona's hut, not far from his own. Kapunya allegedly refused to sleep in that hut. The deceased then nonetheless asked PW2 to come with her to her hut and collect blankets for Kapunya. The deceased, however, did not return to the hut where Kapunya was to sleep.
- 1.7. With the blankets in hand, Kapunya started to prepare to sleep and PW2 returned to his abode.
- 1.8. PW1 gave a different part of the narrative covering a different period. She testified that around 19:00 hours on the 19th December 2013, the deceased and the appellant went to her kitchen at Ngebe's place to cook some food. Around 20:00 hours PW1 retired to bed, leaving the two lovers in the

kitchen in the company of two other persons: the deceased's son, Kakundu Luambo and the deceased's elder brother, Sililo Nyambe. Both of these testified for the prosecution. They testified as PW3 and PW4 respectively.

- 1.9. Both PW2 and PW3 testified that they saw the appellant and the deceased go to sleep together in the deceased's hut around 22:00 hours. The following morning, however, the deceased was found dead in her hut with her clothes folded in a mosquito net belonging to the appellant which he was seen carrying the previous night.
- 1.10. As for PW2 news that the deceased had died in her hut – which was just across the road from his place, was relayed by the deceased's children who wondered whether it was Kapunya who had killed her. The appellant had meanwhile disappeared from the village.
- 1.11. The matter was reported to the police who collected the body and took it to Kalabo Hospital Mortuary. The villagers' search for the appellant in the village was unfruitful. He was, however, found and apprehended a couple of days later in

Mitu village, which is about two hours walk from Kazauli village where the deceased died. It is alleged that he attempted to elude the people that apprehended him.

- 1.12.** According to the testimony on record, prior to the appellant's disappearance, he had been seen leaving the deceased's hut around 04:00 hours on 20th December by fishermen returning from an overnight fishing mission who, using lighting on their touches, recognised him. According to one of the fisherman, Mukumbi Mukumbi (PW5), the fishing party even asked him to identify himself, which he did. They left him standing outside the deceased's hut with two black dogs and spears in hand.
- 1.13.** Following the conveyance of the deceased's body to Kalabo Hospital Mortuary, an autopsy was conducted on the body by Dr. Kabongo. The report of that examination was kept by Sergeant Muyongo Sikabongo, PW6, who later produced it in court. It showed that the deceased had died of 'neurogenic shock.'

- 1.14.** With all this evidence before him, the learned trial judge was satisfied that a *prima facie* case had been established against the appellant. He thus placed him on his defence.
- 1.15.** The appellant testified on his own behalf and called no other witness.
- 1.16.** In his defence, the appellant gave what sounds on all accounts like a splendid explanation, accounting for his movements on the 19th and the 20th December, 2013. That explanation is worth reciting in some detail if his protestation in this appeal is to be fairly appreciated.
- 1.17.** According to the appellant, he did on the 19th December, 2013 take his belongings to the deceased's hut for safe keeping as he intended to follow his wife who had left the matrimonial home.
- 1.18.** The deceased, according to the appellant, accepted to keep those belongings. She left him in her hut and went to prepare nshima at a place about thirty meters away. She returned later and they had a cordial chat. They were in due course joined by the deceased's son.

- 1.19.** The appellant told the trial court that he left the deceased later that evening and went to spend a night at what he called Manjekwa's place, some one hundred meters away from the deceased's hut. The following morning, the deceased's elder brother (Nyambe Sililo, PW4) went to the appellant and requested him to go and attend to the deceased as she had fallen very ill. Being a herbalist, the appellant obliged. Upon arrival at the deceased's hut, his prognosis was that the deceased was at that time so sick that she was unlikely to survive. He thus did not give her any treatment.
- 1.20.** According to the appellant, the deceased lived with Kapunya who he believed had fled in the night, leaving the deceased in a critical state of sickness. This fact, according to the appellant, was confirmed by the deceased's son Makoi (also known as Kakundu Luambo, PW3) who had even gone to look for Kapunya and eventually apprehended him.
- 1.21.** It was his further testimony to the court that upon being brought back to his lover, Kapunya asked for a hoe to go and dig some herbs for the deceased. At that stage, a decision

was made to take Kapunya to the police. Two drunk young men, however, stopped the move to take Kapunya to the police but instead started beating him.

- 1.22. Kapunya was later locked up in the deceased's hut with the deceased before she died. People, thereafter, dispersed and the appellant went back to Manjekwa's place where he continued treating another woman who was sick. He never went back to the deceased's hut.
- 1.23. As the police were picking the deceased's body, he left the village and followed his wife at Mitu village. It was there that he was found by police and others on the 5th January, 2014. He was at the time in his in-law's court yard called Kasinji.
- 1.24. According to the appellant, police instructed him to go and collect the goods which he had left at the deceased's place for safekeeping. He did pick the items before he was taken to police and lodged there as the suspected murderer.
- 1.25. He denied that the deceased was an intimate friend but that she was merely one of his patients as he was a herbalist treating her of her ailment.

1.26. The learned High Court judge reviewed the evidence and convicted the appellant. He quite fairly acknowledged that the evidence against the appellant was circumstantial. He, however, disbelieved the appellant's version of events.

1.27. The court, finding no extenuating circumstances, sentenced the appellant to death.

2.0. **APPEAL AGAINST THE JUDGMENT**

2.1. The appeal to this court is on one ground framed as follows:

The trial judge erred in law and in fact when he convicted the appellant based on circumstantial evidence when the same did not attain such a degree of cogency as to infer only a guilty inference. [sic!]

2.2. At the hearing of the appeal, Mrs. Zulu-Musonda relied on the heads of argument which were filed on behalf of the appellant. The thrust of the argument she postulated in them was that, on the evidence deployed before the trial court, there are alternative inferences that can be made other than that of the guilt of the appellant although the appellant may have been the last person to be seen with the deceased.

2.3. According to the learned counsel, there is no evidence on the record that the appellant and the deceased were 'in bad terms with each other.' Nor is there evidence of a strained relationship between them at any time prior to the demise of the deceased. To the contrary, evidence was led which confirmed that the appellant and the deceased enjoyed an affable relationship up until the last night they were seen together.

2.4. The learned counsel referred us to the case of **Nicola Malaya v. The People**⁽¹⁾. In that case, where the accused was the last person to be seen with the deceased, we stated, among other things, that:

In this case, the appellant and the deceased were in good terms and there was no reason or motive for the appellant to turn against him.

2.5. Mrs. Zulu-Musonda, reminded us that the evidence on record does not reveal the time of the death of the deceased. There is, according to counsel, a window of opportunity for someone else to have attacked and killed the deceased between 04:00 hours, when the appellant is alleged to have been seen at the

deceased's door, and 09:00 hours when the deceased was discovered lifeless in her hut.

2.6. Counsel then turned to the deceased's other lover – Kapunya. She recalled the evidence of PW2 that the deceased was with that other lover on the 19th December, 2013 around 18:00 hours; that Kapunya went to sleep in a hut at Machona's which was just across the village path from the deceased's hut. Counsel boldly submitted that it was possible that Kapunya could have killed the deceased between 04:00 hours and 09:00 hours, out of jealousy arising from the deceased being in a relationship with the appellant.

2.7. Mrs. Zulu-Musonda shortly submitted that the circumstantial evidence in this matter did not take the case out of the realm of conjecture to attain a degree of cogency to permit only an inference of guilt. She referred to our often quoted statement in the case of **David Zulu v. The People**⁽²⁾ regarding the weakness peculiar to circumstantial evidence and the obligation of the presiding judge to guard against making wrong inferences.

2.8. To further support her submission, counsel picked and reproduced a statement we made in **Naweji v. The People**⁽³⁾ that:

A conviction may be recorded where the circumstantial evidence is such that the only inference reasonably possible is guilty.

She also quoted from our judgment in **Saidi Banda v. The People**⁽⁴⁾ where we suggested the approach a judge faced with circumstantial evidence would usefully employ, namely that of staged reasoning.

2.9. More purposefully, Mrs. Zulu-Musonda quoted a passage from our judgement in **Dorothy Mutale and Richard Phiri v. The People**⁽⁵⁾ where we stated that:

Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the court will adopt the one which is more favourable to an accused if there is nothing in the case to exclude such inference.

2.10. Counsel stressed that a possible inference that could be drawn on the evidence as it was presented to the trial court is that the deceased could have died between 04:00 hours

and 09:00 hours at the hands of a person other than the appellant.

2.11. The final issue the learned counsel for the appellant dealt with was the reported escape of the appellant to Mitu village following the death of the deceased and his attempt to elude apprehension when he was found. She submitted that contrary to the evidence of those who stated that the appellant escaped, he himself testified that he went to Mitu village to follow his wife and yet, the learned trial judge wrongly rejected this explanation by the appellant. Evidence of running away is not, according to the learned counsel, in any case conclusive evidence of guilt. For this submission, we were referred to the case of **Green Musheke Kuyewa v. The People⁽⁶⁾**.

2.12. We were urged to uphold the appeal and set the appellant free.

3.0. THE RESPONDENT'S CASE ON APPEAL

3.1. Mrs. Chipanta-Mwansa, learned Deputy Chief State Advocate, intimated from the outset that the respondent

supports the conviction as the circumstantial evidence relied upon was cogent and only an inference of guilt could be drawn from the circumstances of the case.

- 3.2. After recounting the material facts as set out in the record, the learned Deputy Chief State Advocate submitted that there is no evidence of any other person including Kapunya, having gone into the deceased's hut. According to the learned counsel, the mysterious disappearance of the appellant at an ungodly hour of 04:00 hours raised the question as to why the appellant could leave that hut and in that manner.
- 3.3. Counsel submitted that even if evidence of running away may not, on its own, be conclusive evidence of guilt as was held in **Green Musheke Kuyewa v. The People**⁽⁶⁾, it was, in counsel's submission, sufficient to anchor the conclusion that the trial court came to.
- 3.4. More daringly, counsel submitted that all circumstances considered together lead to one conclusion, namely, that the appellant was running away from something he had done;

the killing of the deceased. Quoting from our judgment in **Saidi Banda v. The People**⁽⁴⁾ counsel posited that despite its weakness, circumstantial evidence is in many instances as good as, if not better than direct evidence. In this particular case, the circumstantial evidence was good enough to warrant a safe conviction of the appellant. The case of **Joseph Banda and Ashanti Tongo v. The People**⁽⁷⁾ was also cited to support her submission.

- 3.5. It was counsel's further submission that the possibility that another man, Kapunya, may have gone to kill the deceased, is farfetched. She reminded us that PW2 had quite categorically submitted that Kapunya had remained at his hut and the witness had gone to collect blankets from the deceased's hut for Kapunya. According to this witness, counsel added, the deceased went to her hut while Kapunya remained in a hut at Machona's. All this happened much earlier in the day. Yet, on the same day in the night the deceased and the appellant were seen going to sleep in the deceased's hut.

3.6. It was counsel's submission that the trial judge was thus right to find that the circumstantial evidence led to one inference only, namely, the guilt of the appellant, and was thus right to convict him as he did. We were thus urged to uphold the conviction.

4.0. OUR ANALYSIS AND DECISION

4.1. We have considered, with interest, the circumstances in which the death of the deceased occurred, the evidence given by the various witnesses and the submissions of the learned counsel for the respective parties. There is no doubt that the conviction was based on circumstantial evidence. And so, that brings us back to the one cardinal question germane to considering the appropriateness or otherwise of any conviction based on circumstantial evidence: whether the circumstantial evidence was so cogent as to lead only to the inference of guilt.

4.2. We do not believe there is much to be achieved by reciting the authorities on circumstantial evidence. The law has been articulated time and again, and the learned counsel for the

parties in this case have alluded to some of the case authorities including, **David Zulu v. The People**⁽²⁾, **Said Banda v. The People**⁽⁴⁾, and **Dorothy Mutale and Richard Phiri v. The People**⁽⁵⁾.

- 4.3. The question determinative of this appeal is whether the inculpatory facts or circumstances relative to the deceased's death, are incompatible with the innocence of the appellant and, above all, incapable of explanation upon any other postulation than that of the guilt of the appellant.
- 4.4. It is imperative to isolate the material facts as given in the evidence of the witnesses and from there to determine whether the missing facts linking the death of the deceased to the appellant can be explained on that one hypothesis only.
- 4.5. Excluding the subtleties, the facts that generated a need for an inference are these: the deceased had two lovers - Kapunya and the appellant. In the evening before the night in which she died, she was with Kapunya and they were looking for a place to sleep. Kapunya slept in Machona's hut

just across a village path from the deceased's hut. In the evening, the deceased was with the appellant in her hut. He claims he went off somewhere in the night to sleep and left her alone in her hut. She was found dead in the morning around 09:00 hours. The appellant was allegedly seen leaving the deceased's hut with his two dogs and spears around 04:00 hours. Her death was discovered around 09:00 hours.

4.6. On the foregoing facts, is the conclusion that the appellant is the only person that could have killed the deceased the sole inference to be drawn? We think not. As Mrs. Zulu-Musonda submitted, even if it is accepted that the appellant left the deceased's hut at 04:00 hours, there is a period of five hours that created a window of opportunity for anyone else to have murdered the deceased.

4.7. The situation gets even more precarious when the appellant's own version of events is brought into play. We deliberately recounted his perspective of what happened in some detail because he referred to plausible events and actual people.

He explained that he spent only part of the evening with the deceased and left for his own place.

4.8. The appellant said many other pertinent things in his evidence. For example, that after he went to his home to sleep, he was called in the morning by Nyambe Sililo (PW4) to go and treat his sister, the deceased. He went there and found that her condition was dire. This, led to a search for Kapunya who was eventually apprehended, beaten and locked up in the deceased's hut.

4.9. That evidence, damning as it was to Kapunya, remained unshaken in cross-examination. What is just as curious is that when PW4 testified, he did not explain the details that the appellant gave with regard to Kapunya and what happened the following morning. This could indeed provide a particularly strong endorsement for a perception that PW4's testimony was misleading, or at any rate, incomplete. It could also, of course, be that it was a concoction on the part of the appellant. Either way, effective cross-examination would have been useful to the court.

- 4.10. A considerable amount of useful and particularly relevant evidence was elicited from Sikabongo Muyongo (PW6), the investigating officer. He said, for example, [at page 60 of the Record, line 18 to 24] when asked to explain what his investigations found about Kapunya:

My lord, Kapunya was the man friend to the now deceased and on the material day Kapunya was also seen together with the deceased. He was seen by Sitali Simangolwa [PW2] who has testified before this court and in fact Kapunya and the deceased went to the house of Sitali Simangolwa. Then during the night, he spent his night in the kitchen of the father to Sitali Simangolwa.

- 4.11. Elsewhere in his testimony [p.61 of the Record, lines 6 - 4] PW6 stated as follows:

A: The now accused told me that when he went to visit the deceased Nanjila Sililo he asked the deceased about the other man friend.

Q: Which other man friend?

A: Kapunya. And my lord, this was because the now accused wanted to spend a night at the house of Nanjila Sililo the deceased, however, my lord, insisted and told the accused that the other man Kapunya will be coming.

- 4.12.** What emerges from the foregoing is that the appellant had given pointers to the police about the possible involvement of Kapunya in the death of the deceased. Ideally that claim should have been investigated. Kapunya would in any event have made a useful witness.
- 4.13.** Taken in the round, it seems to us that there were areas in the evidence tendered before the lower court that raised considerable uncertainties as to whether indeed the appellant committed the crime, or whether it was anyone else with an opportunity and a possible motive such as Kapunya. The appellant is entitled to have any lingering doubts resolved in his favour.
- 4.14.** We agree with Mrs. Zulu-Musonda that the inference that the appellant was guilty of murdering the deceased, was, on the circumstantial evidence available to the court, not the only inference that could be made. As we have shown, there were other equally reasonable inferences that could be made.

- 4.15. In cross-examination of the appellant much premium was placed on the fact that the appellant had attempted to bolt when the police went to Mitu village to arrest him following his disappearance from the village where the death occurred.
- 4.16. As counsel for the respondent has readily admitted, it seems from the *obiter dictum* in **Green Musheke Kuyewa v. The People**⁽⁶⁾ which was also referred to by the learned trial judge in his judgment, that the common adage that the 'guilty are afraid' does not necessary hold true in determining whether an accused person is guilty or not.
- 4.17. It follows from the foregoing reflections that we entertain serious reservation about the guilt of the appellant. The guilty inference made was not, in our considered view, the only reasonable inference that could be made in the circumstances.

- 4.18. We hold that the appeal has merit. We upset the judgment of the High Court and acquit the appellant forthwith.



.....
E. M. Hamaundu
SUPREME COURT JUDGE



.....
M. Malila
SUPREME COURT JUDGE



.....
R. M. C. Kaoma
SUPREME COURT JUDGE