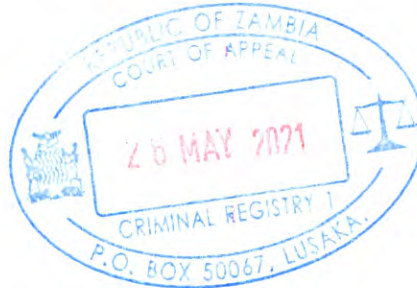


**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Criminal Jurisdiction)**

APP. No. 140/2020

BETWEEN:

HATCHWELL AMALIMBA



APPELLANT

AND

THE PEOPLE

RESPONDENT

**CORAM : Kondolo, Chishimba and Sichinga JJA
On the 21st April, 2021 and 26th May, 2021**

For the Appellant : Mrs. L. P. Tindi, Legal Aid Counsel of Messrs
Legal Aid Board

For the Respondent : Mrs. M. Muyoba, State Advocate of Messrs
National Prosecution Authority

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASE AUTHORITIES CITED:

1. Yokoniya Mwale v The People SCZ Appeal No. 285/2014
2. Chitalu Musonda v The People SCZ Appeal No. 138/2014
3. Chabala v The People (1976) ZR 14
4. David Zulu v The People (1977) ZR 151
5. Mbinga Nyambe v The People (2011) Vol. 1 ZR
6. Haonga and Others v The People (1976) Z.R. 200
7. Saluwema v The People (1965) ZR 4
8. Mwanaute v The People SCZ Appeal No. 200 of 2011
9. Andrew Mwenya v The People SCZ Appeal No. 640/2013

10. Saidi Banda v The People SCZ Judgment No. 30 of 2015

LEGISLATION CITED:

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

1.0 INTRODUCTION

1.1 The appellant was charged and convicted of the offence of murder contrary to section 200 of the Penal Code Chapter 87 of the Laws of Zambia. The particulars alleged that Hatchwell Amalimba, on 31st May, 2018 at Monze in the Monze District of the Southern Province of the Republic of Zambia, did murder Daisy Haabanji Hachiwele.

1.2 Upon convicting him, the court below sentenced him to death.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The case for the prosecution was anchored on the evidence of seven witnesses. The summary of the evidence is that sometime in 2017, PW2, Chemist Haabanji, the husband of Daisy (deceased), was unable to fulfil his conjugal duties towards his wife owing to an erectile (sexual) dysfunction. As a solution, Haabanji gave consent to Daisy and the appellant to be engaging in sexual intercourse under a Tonga traditional

practice known as 'Lubambo'. As consideration for this sexual access, Haabanji demanded the sum of K1,500.00 from the appellant which was not paid. However, on request, Haabanji allowed the appellant to begin having sexual relations with his wife, on condition that the latter pays the sum agreed upon in due course.

2.2 Around 18:00 hours on 31st May, 2018, Daisy Haabanji went to the makeshift store of her daughter, PW3, Beauty Chilundika, where she bought sweet aid. Whilst at the store, the appellant came with his bicycle and left with Daisy Haabanji. Thereafter, Daisy was not to be seen alive.

2.3 Chemist Haabanji, (PW2) who had taken a child to school, arrived back home between 18:00 and 19:00 hrs and did not find his wife. The children told him that she had gone to Chilundika's shop. As the deceased had still not returned home by 21:00 hrs, Haabanji went to PW1, Chavwa Mweemba and asked him to accompany him to PW3's shop. On being told that his wife had left the shop in the company of the appellant, Haabanji proceeded to the appellant's home. When queried on the whereabouts of Daisy, the appellant denied being with her.

The appellant informed PW2 that he last saw Daisy at PW3's shop.

2.4 Thereafter, Haabanji and Mweemba proceeded to the home of PW4, Edith Hachiwele, his mother-in-law and informed her that Daisy was missing. Hachiwele, Mweemba and Haabanji all went back to the appellant's home who, when asked again about the whereabouts of the deceased, responded angrily but joined them in a search for the missing Daisy. They followed the tyre marks of the appellant's bicycle which Chilundika identified. However, as they were walking, the appellant suddenly bolted and ran away. Efforts to pursue him failed. Haabanji proceeded to report the matter to the Village Headman, Bristol Hamilimo, PW6.

2.5 On the morning of 1st June, 2018, the body of Daisy Haabanji was discovered by women in the bush. It was found covered with a chitenge material and a coat written 'ZESCO' covering her face. Her underwear was beside her body. There was bleeding observed from her eyes, nose and mouth. A postmortem report indicated the cause of death as severe head

injuries and neck strangulation. According to PW2, the deceased was hit on the head and legs.

2.6 After the deceased was buried, Haabanji and Mweemba were detained by the police on suspicion of causing the death of the deceased. Whilst in detention, Haabanji met the appellant who had handed himself to the police and was interviewed by the police in his presence. During the interview, the appellant confessed to killing Daisy Haabanji after she told him that her husband would give her to another man since the appellant had not paid the sum of K1500.00 consideration for sleeping with her. Haabanji and Mweemba were subsequently released from custody.

2.7 The evidence by Chavuwa Mweemba, (PW1) uncle to PW2 was that he was aware of the arrangement between his nephew, Daisy and the appellant in respect of the practice of 'Lubambo'. That he accompanied his nephew to look for his missing wife and that the appellant refuted being with Daisy. During the search, the appellant had ran away. The rest of his evidence was as narrated by PW2 and will not be recited save that he was detained with his nephew at one point and later released.

2.8 The relevant evidence by PW3 and PW5, children of the deceased was that the appellant was wearing a blue coat labelled 'ZESCO' and that he met Daisy at PW3's shop and left with her. Edith Hachiwele, the deceased's mother testified that her daughter's body was found covered with a blue work suit labelled ZESCO which the appellant was seen wearing. She refuted knowledge of a sexual relationship arrangement between the deceased and the appellant.

2.9 The appellant admitted in PW1 and PW2's presence of committing the offence because Daisy had told him that her husband wanted to give her to another man.

2.10 In his defence, the appellant denied committing the offence stating that Haabanji had found him in the bush as he was about to engage in sexual intercourse with Daisy. He told the court below that Haabanji, was upset with his wife for entertaining the appellant when he had not paid the sum of K1,500.00 being consideration for the 'Lubambo'. According to the appellant, Haabanji who was armed with a knob-kierie, descended on the deceased and beat her. The appellant fled and watched from a distance as Haabanji assaulted the deceased

with the knob-kierie on the head before getting hold of her neck causing her to fall to the ground. He further told the court below that the deceased wore a blue ZESCO work suit, a skirt and blue chitenge.

2.11 According to the appellant, Haabanji did not come to his home looking for the deceased. PW2 came to demand for his money for the 'Lubambo'. He further testified that because Haabanji had threatened to grab his goats, he decided to go to the police to report the matter. He was instead detained and charged with the murder of the deceased.

3.0 **DECISION OF THE COURT BELOW**

3.1 After considering the evidence before her, the trial judge stated that PW1, PW2, PW3, PW4 and PW5 being related to the deceased and to each other are witnesses that could be categorised as witnesses with a possible interest of their own to serve if the evidence reveals bias or motive to falsely implicate the appellant. She considered the cases of **Yokoniya Mwale v The People** ⁽¹⁾ and **Chitalu Musonda v The People** ⁽²⁾.

3.2 The learned judge accepted the evidence of PW3 and PW5 that the appellant was seen wearing the ZESCO work suit at

Chilundika's shop. She reasoned that the fact that the sweetener the deceased bought was found in the work suit does not negate the fact that the accused was wearing the said coat. She found no reason as to why PW3 and PW5 would falsely implicate the appellant.

3.3 In respect of the evidence of the appellant reporting himself to the police, the court below found that the appellant was not falsely accused by the police of the murder but that the appellant told the police that he had committed the crime. She found the evidence of leading to be weak and unreliable as PW7 had been to the crime scene previously when he went to collect the body of the deceased. The court below also did not accept the evidence of leading as PW7 never alluded to it.

3.4 As to who committed the offence, the court below reasoned that the prosecution's case was anchored on circumstantial evidence. She found as a fact that the appellant was the last person seen with the deceased. The court below rejected his version of events of the fateful evening as unbelievable because PW2 had given the appellant the freedom to have a sexual relationship with the deceased as and when he wanted and that

there was no evidence of a change in this position. The learned judge found no reasonable explanation as to why the appellant chose not to reveal to PW1 or PW3 that he saw Haabanji assaulting the deceased.

3.5 The trial judge considered the explanation of the appellant in view of the case of **Chabala v The People** ⁽³⁾, and took the view that the explanation tendered by the appellant was not reasonably true, and rejected it. The appellant had the opportunity to commit the offence. Further, the conduct of the appellant running away from PW1, PW2, PW4 and others during the search for the deceased, revealed a guilty mind on the part of the appellant.

3.6 Consequently, the trial judge found nothing on the part of PW1, PW2, PW3, PW4 and PW5 which could have motivated them to falsely implicate the appellant as the evidence showed that the appellant enjoyed a healthy relationship with them. The court below came to the conclusion that the only reasonable inference to be drawn from the facts, is that it is the appellant who killed the deceased.

4.0 GROUNDS OF APPEAL

4.1 The appellant filed one ground of appeal as follows:

1) The learned trial court erred in law and fact by convicting the appellant based on circumstantial evidence when the inference of guilt was not the only reasonable inference that could be drawn from the facts of the case at hand.

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant argues that the court below based the conviction on the evidence of PW2 and PW3. Citing the cases of **David Zulu v The People** ⁽⁴⁾ and **Mbinga Nyambe v The People** ⁽⁵⁾, it was contended that it cannot be said that just because the appellant ran away during the search for the deceased, then he is guilty of the offence as there are several inferences that can be drawn from the facts and evidence adduced by the prosecution.

5.2 In particular, it was submitted that it is not known whether PW2 found the deceased and the appellant after PW3 showed him the direction the duo went. In addition, it was argued that it is not possible that PW2 was unmoved by the sexual relationship between the appellant and the deceased, and the allegation of PW5 not being his child. This, it was submitted,

could have provoked PW2 to an extent of killing the deceased. For this reason, the appellant submits that PW2 ought to be treated as a suspect witness with his evidence being received with caution.

5.3 The testimony of PW3 was also called into question for being different from the statement she gave to the police in that she omitted to state that she told PW2 that the deceased bought air-time from her and about the coat found on the body of the deceased. For this reason, the appellant contends that PW3 is not a credible witness and her evidence ought not to be relied on. The case of **Haonga and Others v The People** ⁽⁶⁾ was cited as authority.

5.4 Lastly, the appellant submitted that the appellant gave a reasonable explanation in his defence which was not rebutted by the evidence of the prosecution and that a reasonable doubt exists. The case of **Saluwema v The People** ⁽⁷⁾ was cited for the principle that where an accused explanation is reasonably possible but not probable, then a reasonable doubt exists. Therefore, there being more than one inference that can be

drawn from the evidence on record, we were urged to allow the appeal.

6.0 **RESPONDENT'S ARGUMENTS**

6.1 Heads of argument in opposition were filed on behalf of the respondent in which it was submitted that the evidence of PW3 and PW5 was well corroborated to the effect that the appellant was the last person seen with the deceased having left with her on his bicycle. In relying on the case of **Mwanaute v The People**⁽⁸⁾, it was submitted that where there is evidence that the accused person was last seen with the deceased person and other circumstances that show that the accused person could have been the one who murdered the deceased, the court may draw an inference of guilt.

6.2 In any case, it was argued that though PW3 and PW5 can be categorised as witnesses with an interest to serve, they were reliable witnesses as there was no evidence of bias or possible bias on their part. The case of **Andrew Mwenya v The People**⁽⁹⁾ was cited which espouses the principle that an interest to serve on the part of a witness should not be created without

establishing particular circumstances which could have motivated such a witness.

6.3 In this regard, it was submitted that the evidence shows that the blue ZESCO coat found on the body of the deceased belonged to the appellant as PW3 and PW5 had seen him wearing it on the day the deceased was killed while with her. Further, the evidence on record showed that the appellant reported himself to the police stating that he had killed a person in Manekela Village. Though at trial, the appellant gave a different version of this aspect, his account of events was unbelievable as it was devoid of logic. In any case, there was no reason or evidence on record to show why police officers, when he reported himself would lie against or falsely implicate the appellant.

6.4 Therefore, the conduct of the appellant running away during the search for the deceased shows that he was not an innocent man unless a perfectly good and reasonable explanation is tendered, which in this case, was not. Further, the appellant's evidence that he witnessed PW2 assaulting the deceased which eventually led to her death without him reporting this to the

police or any other person, is unbelievable and very strange considering that he was in a way, a party to the marriage by virtue of the traditional practice of 'lubambo.'

6.5 Further, it was contended that the time the appellant alleges the incident happened is illogical for the reason that while PW5 and the appellant both testified that the appellant and the deceased were last seen around 18:00 hrs, PW2 was not in the village as he arrived much later.

6.6 Lastly, the respondents submitted that taking into consideration the evidence on record as a whole, the inculpatory facts on record are irreconcilable with that of an innocent person. Citing the case of **Saidi Banda v The People** ⁽¹⁰⁾, the respondent submitted that the pieces of evidence highlighted above formed the circumstantial evidence linking the appellant to the offence, and that these pieces of evidence have taken the case out of the realm of conjecture leading to an inference of guilt.

6.7 We were accordingly urged to dismiss the appeal.

4 7.0 **DECISION OF THE COURT:**

7.1 We have considered the appeal, the evidence adduced in the court below, the heads of argument and authorities cited by both the learned Counsel for both parties.

7.2 The following facts are not in dispute. Chemist Haabanji and Daisy (the deceased hereinafter) were husband and wife, living in the same village as the appellant. PW2 suffered from severe erectile dysfunction. Erectile dysfunction (impotence) is the inability to maintain an erection sufficient to have sexual intercourse.

7.3 As a result of this erectile dysfunction problem, PW2 allowed his wife Daisy to choose a man who would satisfy her sexual needs. She settled on the appellant and the three of them agreed to engage in the traditional practice earlier referred to called 'Lubambo'. As consideration for this access, the appellant was to pay PW2 the sum of K1,500 at a later date but the appellant was allowed to immediately commence the sexual rendezvous acts with Daisy. These activities took place in a myriad of places such as shops and in the bushes.

- 7.4 In due course, it appears from the evidence that the appellant became possessive of Daisy to the point where he did not want any other man near her. This 'Lubambo' traditional practice arrangement between the appellant, PW2 and the deceased came to be known by a number of people in the area.
- 7.5 It is further not in issue that no one witnessed the appellant kill PW2's wife hence the appellant's sole ground of appeal based on circumstantial evidence.
- 7.6 Before dealing with the issue of the circumstantial evidence and whether it had attained such a degree of cogency permitting only an inference of guilt, we shall deal with the issue raised by the appellant that PW3 is not a credible witness and that her evidence ought not to have been relied upon by the court below or that the weight attached to it ought to have been reduced.
- 7.7 PW2 is the daughter to the deceased, her evidence was that her mother came to her shop around 18:00 hours on the 31st of May 2018 and bought sweet aid. The appellant joined her mother and the two left together on his bicycle. PW3 identified the blue coat labelled ZESCO as belonging to the appellant which was found covering the deceased's body. It was the coat that the

appellant was seen wearing on the date of the alleged incident. This evidence is contended to vary from the statement given at the police station that PW3 omitted that the deceased purchased talk time from her.

7.8 We are of the view that the evidence of the coat being worn by the appellant was also confirmed by PW5 who saw the appellant when he came to their home wearing a blue top identified in court. Therefore, the court was entitled to find that particular evidence of PW3 as credible. The court below made a finding as to credibility of the witnesses. The court below was in a better position to observe the demeanor of witnesses and chose to believe and rely on the said evidence

7.9 Because of the category into which they fall, the learned trial judge considered the possibility of PW1, PW2, PW3, PW4 and PW5 being witnesses with a possible bias or motive to falsely implicate the appellant and ruled it out based on the evidence adduced. Therefore the court had properly warned itself on the category of witnesses before it.

7.10 The appellant is challenging his conviction arguing that being based on circumstantial evidence, the inference of guilt was not

the only reasonable inference that could be drawn from the facts on record. We accept that there is no direct evidence coming from any of the witnesses to the effect that they saw the appellant committing the offence. Therefore, what is available is clearly circumstantial evidence. In addressing circumstantial evidence, the Supreme Court guided in **David Zulu v The People** ⁽⁴⁾ that;

- (i) *It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.*
- (ii) *It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.*

7.11 Further, in **Saidi Banda v The People** ⁽¹⁰⁾, cited by the respondent, guidance was given on the approach a court must take when the case wholly depends on circumstantial evidence.

The Supreme Court stated thus:

“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. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before it.”

7.12 In this case, the basic facts that have been proved and are not in dispute are that on the fateful day, the appellant went to the home of the deceased wearing the ZESCO coat in search of the deceased where he was met by PW5, the son of the deceased. On being told where she had gone, the appellant followed Daisy to her daughter, PW3's shop. This was between 17:00 and 18:00 hrs. The appellant was also seen by PW3 wearing the ZESCO coat when he had followed Daisy to the shop and that he left with the deceased.

7.13 PW2, who had gone out of the village to a school, only returned home late in the night long after the deceased was seen with the appellant. PW2, together with others including the appellant, began searching for the deceased by tracing her movements without success. During the search, the appellant fled without any warning. The next day, the deceased was found dead in the bush, covered with the appellant's ZESCO coat. A few days after the death of the deceased, the appellant handed himself to the police stating that he had killed the deceased.

7.14 From these facts, there can be no doubt that the appellant is the last known person to have been with the deceased before her demise. His ZESCO coat being found covering the deceased places him at the crime scene while his fleeing away during the search and later handing himself to the police confessing he had killed the deceased, lends credence to the fact that he committed the crime.

7.15 The judgment at J30 shows that the court considered the explanation advanced by the appellant to determine whether it was one that might reasonably be true and if not then guilty would not be the only reasonable inference to be drawn. The


explanation by the appellant was that PW2 found him and Daisy in the bush about to have sexual intercourse and became angry because his wife had not cooked supper for the family. He saw the Haabanji assaulting his wife as he ran away and watched from a distance. The court below rejected this explanation on firm grounds because this Lubambo custom was consented to by PW2 allowing his wife to satisfy her sexual needs with the appellant before the payment. This agreement was not resiled from at any time before the demise of Daisy. Further there is no reasonable explanation for the failure by the appellant who ran away to report the assault to PW3 or the village headman or the police.

7.16 We agree with the lower court's finding that the explanation advanced by the appellant was not reasonably true and thus its rejection.

7.17 Reverting to the issue of whether the circumstantial evidence had taken the case out of the realm of conjecture so that it attained such a degree of cogency permitting only an inference of guilt, the evidence taken together, implicates the accused beyond reasonable doubt in a manner that points to nothing

else but his guilt. We do not see any other reasonable inference that can be drawn from these facts other than an inference of guilt. Consequently, we are satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

7.18 Therefore, we find no merit in the appeal against conviction. We dismiss it and uphold the conviction and sentence of the court below.



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M. M. Kondolo SC
COURT OF APPEAL JUDGE



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F. M. Chishimba
COURT OF APPEAL JUDGE



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D. L. Y. Sichinga
COURT OF APPEAL JUDGE