IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 165,166/2020**
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

MEMORY NAMBELA	**1ST APPELLANT**
KENNEDY MULENGA	**2ND APPELLANT**

AND

THE PEOPLE	**RESPONDENT**

CORAM: **Mchenga DJP, Majula and Muzenga JJA**
On 18th May, 2021 and 26th May, 2021.

For the Appellant : Ms. Z. Ponde, Legal Aid Counsel, Legal Aid Board

For the Respondent: P. Nyangu, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **David Zulu v The People (1977) ZR151**
2. **Dorothy Mutale & Another v The People (1997) ZR 51**
3. **Saluwema v The People (1965) ZR 4**
4. **Kabala Ilunga and John Masefu v The People (1981) ZR 102 (SC)**
5. **Chimbini v The People (1973) ZR191**
6. **Richard Daka v The People – SCZ Judgment No. 33 of 2013**

Statutes referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

The appellants were charged with the offence of murder contrary to **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.** The particulars of the offence allege that between 29th and 30th June, 2018, at Nakonde in the Nakonde District of Muchinga Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder one Emmy Nachalwe.

The prosecution evidence was presented through four witnesses was as follows: Suwilanji Simukoko, PW1, was the husband to the deceased. In the morning of the fateful day, around 06:00 hours, he went to attend a funeral leaving his wife with her brother Martin Simfukwe and her sister Agness Simfukwe asleep at home. He returned around 15:00 hours, not to find his wife at home and he was informed by his in laws that his wife had gone to Tunduma to buy food warmers. Later that evening, he went to check on her at his mother-in-law's place but did not find her. His mother-in-law told him that her daughter had not been to her place and asked him to look for her at his wife's friend's place who is the first appellant herein.

He went back to his house and the following morning, seeing that the deceased was not yet back, he went to his wife's friend's house (first appellant). The first appellant told him that his wife had been to her house the previous day and that she had gotten on a motor bike. After this PW1 proceeded to his mother-in-law's house to look for his wife again and he was told that she had not been and he decided to go to his house.

The following day his mother-in-law came to his house to inquire whether her daughter had returned. He told her that she had not yet returned. She then requested that they look for her at her friend's house. They proceeded to the first appellant's house with Martin Simfukwe. Upon reaching there, they found the first appellant washing the deceased's clothes. When the deceased's mother inquired about the clothes, the first appellant told her that they had exchanged clothes. Later his mother-in-law informed him of a dead person that had been recovered and advised that he checks at the police. It was later confirmed that the recovered body was that of the deceased. The matter was later reported to the police who recovered the clothes that the deceased wore on the day that she disappeared. A pair of shoes that belonged to the deceased was also recovered outside the first appellant's house.

Martin Simfukwe, PW2, a child of tender age, gave sworn evidence after a *voire dire* which was improperly conducted. The cardinal part of his evidence relevant to this appeal is that he identified the clothes the deceased was last seen wearing. Joyce Namutende, the mother to the deceased testified as PW3. Her evidence was similar to that of PW1 except that she indicated that the first appellant and the deceased were very close friends.

The arresting officer, Detective Chief Inspector Kelvin Silombwana, PW4, stated that on 30th June, 2018, the police received information of an unidentified body that was squeezed in a sack and abandoned in the stream. When the body was recovered, it was discovered to have cuts on the forehead, naked and of a female. It was later identified to be the deceased. Investigations were instituted and on 1st July, 2018, the police received information that the first appellant was found washing a jersey that the deceased wore the day she left her house. The police recovered the deceased's jersey, blue jean top and a pair of worn-out shoes from the first appellant's house. The first appellant was later picked up for questioning and led the police to the second appellant. The postmortem report revealed that the deceased died of head injuries.

After considering the evidence by the four-prosecution witnesses, the trial court found the appellants with a *prima facie* case and were placed on their defence.

In her defence, the first appellant told the trial court that on Friday 30th June, 2018, around 14:00 hours, her friend (the deceased) came to her house while wearing a blue dress, a blue and white striped jersey and black slippers. She told her that she was from Tanzania and that she wanted to drink beer but could not go to the bar putting on a long dress. The two exchanged clothes as they usually did and later proceeded to the bar to drink. She told the court that while they were drinking, the deceased disappeared.

The first appellant went outside to look for her, where she found her with the second appellant. The deceased later returned and informed the first appellant that she was drunk and that her boyfriend (second appellant) was escorting her home. The first appellant remained alone looking for men and once she found one, she also left. She told the trial court that the following morning, PW1 went to her house and asked after the deceased and she told him that she was with her the previous day and that after she got drunk, she went to hike a motor bike. She did not tell him that she had gone with a man in order to protect their marriage. Later that day she went to look for the deceased and could not find her. She asked the second appellant the where

abouts of the deceased and the second appellant said that he had escorted her but that she remained at a bar with four other friends.

The following morning when PW1, PW2 and PW3 got to her house, they found her washing the deceased's jersey while wearing her jean dress. They asked her if she had seen the deceased and she told them that she had last seen her on Friday. They later returned with police officers who told her that her friend was dead and got the deceased's clothes. At that point, she told them that she knew of a man who left with the deceased and led them to the second appellant's house. The second appellant was later apprehended from a nearby bar.

In his defence, Kennedy Mulenga, DW2 gave unsworn evidence and told the court that on 29th, June, 2018, he met with the deceased, his girlfriend of six months, at a bar near his house. She was dancing and later told her that she was drinking with her friend (first appellant). He later took her to his house where they had a chat for about an hour after which she requested him to escort her. On their way, she got into a bar and told him that she had found her friends from the same village who were waiting for a taxi. He left her there and returned to his house. The following morning, he met the first appellant who asked him about the deceased, he narrated to her

how they parted ways and that later the police in the company of the first appellant apprehended him.

The trial court considered the evidence presented before it by both parties. We noted that the evidence before it was solely circumstantial and therefore an inference of guilty can only be drawn if it is the only inference that can reasonably be drawn from the facts before it. The court further noted that the coincidences on this case are not only odd but raise a lot of questions in the midst of strong circumstantial evidence without consistent explanation.

Based on this the court convicted the appellants and later sentenced them to death.

Before us the appellants filed one ground of appeal couched as follows:

> **The learned trial Judge erred in law and in fact when he held that the circumstantial evidence in this case was so cogent that it had taken the case outside the realm of conjecture that the only inference, he could draw was that the appellant is guilty.**

At the hearing of this appeal, learned Counsel for the appellants Ms. Ponde informed the court that she will rely entirely on the filed heads of argument. Learned Counsel for the Respondent Ms. Nyangu sought leave to file the respondent's arguments. Leave was granted and she equally placed reliance on the said arguments.

In support of the lone ground of appeal, Counsel for the appellant argued that the evidence herein was purely circumstantial, being that the 1st appellant was found with clothes for the deceased and for the 2nd appellant being that he was the last person to be seen with the deceased. Counsel contended that both appellants gave explanations which could reasonably be true. That the 1st appellant explained that she was friends with the deceased and had exchanged clothes with her as they used to do so. 1st appellant explained that she did not mention immediately that the deceased had gone with the 2nd appellant for fear of ruining the friend's marriage. Regarding the 2nd appellant, Counsel stated that he explained that the deceased was his girlfriend whom he subsequently left at the bar as she informed him that she would go home with some friends whom she found. It was further argued that the circumstantial evidence had not taken the case outside the realm of conjecture so as to permit only an inference of guilt. Reliance was placed on the case of **David Zulu v The People[1].** Counsel argued further that there are other inferences which are possible unlike a conviction as both the appellants parted ways with the deceased especially in the light of their explanations. Reliance was placed on the cases of **Dorothy Mutale and Others v The People[2] and Saluwema v The People[3].** Learned Counsel

thus prayed that the appeal be allowed, convictions be quashed and the sentences be set aside.

Ms. Nyangu on behalf of the respondent supported the convictions. She argued that the trial court was on firm ground when it held that the circumstantial evidence in the instant case was so cogent that it had taken the case outside the realm of conjecture, such that the only possible inference that could be drawn was that the appellants killed the deceased especially in the light of their behaviour. We were referred to the case of **Kabala Ilunga and John Masefu v The People[4]**, where the Supreme Court stated that:

> **"It is trite law that odd coincidences, if unexplained may be supporting evidence. An explanation which cannot reasonably be true is in this connection not an explanation."**

Counsel further argued that since the 2nd appellant elected not to give evidence in the circumstances of the case supports the case against him. Reliance was placed, for this proposition, on the case of **Chimbini v The People[5].** We were urged to dismiss the appeals.

We have carefully considered the evidence on record, the judgment of the trial court and the arguments by Counsel for both parties.

As rightly observed by the learned trial judge, the evidence in this appeal is anchored on circumstantial evidence. The question before us is

whether the circumstantial evidence herein has taken the case outside the realm of conjecture so as to allow only an inference of guilty?

Before we proceed any further, we wish to comment on the manner in which the *voire dire* was conducted in respect of PW2, a child below the age of 14. The learned trial Judge had this to say before conducting the *voire dire:*

> **"I will proceed and ascertain whether the witness possesses sufficient intelligence to give evidence on oath."**

The questions put to the witness are found pages 13 to 15 of the record. The questions focused on establishing that the child witness was possessed of sufficient intelligence. At the end of the inquiry, the trial court delivered the following ruling:

> **"The juvenile posses sufficient intelligence to give evidence on oath, he can be sworn in."**

We wish to remind trial courts that the test for receiving evidence under **Section 122 of the Juveniles Act**[1] is twofold: the child must possess sufficient intelligence for evidence to be received and must understand the duty to tell the truth. The Supreme Court in the case of **Richard Daka v**

The People[6] adequately addressed the amendment to **Section 122 of The Juveniles Act** as follows:

> **"In the instant case, the *voire dire* in contention is found at page 10 and 11 of the record of proceedings. The Court concluded that the child possessed sufficient intelligence to give evidence on oath but it did not specifically state that the child understood the importance of telling the truth. Therefore, from the requirements of the law under Section 122 of The Juveniles Amendment Act, 2011, we are satisfied that the *voire dire* was defective. We therefore allow this third ground."**

We therefore hold that the *voire dire* in respect of PW2 was defective and her evidence will be discounted entirely. We must hasten to state that the exclusion of PW2's evidence does not materially effect the evidence on the record. This is because the import of PW2's evidence relates to the clothes which the deceased wore the day she left her home and there appears to be little or no dispute on this issue.

We now revert to the main issue in this appeal. The facts in this case are that the deceased left her home reportedly in order to go and buy food warmers in Tanzania. She never returned. In the quest to locate her whereabouts, the husband to the deceased (PW1) and the mother to the deceased (PW3) went to the 1st appellant a known friend to the deceased.

They found the 1st appellant wearing a dress for the deceased and the deceased's jersey was on the line. When asked about the clothes by PW3,

the 1st appellant explained that she had exchanged clothes with the deceased. A body was recovered in stream which was later identified as being that of the deceased. The 1st appellant was thus apprehended and led to the apprehension of the 2nd appellant, whom according to her explanation to the police, was the person who went with the deceased from a named bar the day when she disappeared.

Earlier on, we pointed out that the case is anchored on circumstantial evidence. In the celebrated case of **David Zulu v The People**[1] the Supreme Court held *inter alia* that:

> **"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of fact in issue may be drawn.**
> **It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such degree of cogency which can permit only an inference of guilt.**
> **The appellant's explanation was a logical one and was not rebutted, and it was an unwarranted inference that the scratches on the appellant's body were caused in the course of committing the offence at issue."**

The 1st appellant explained that she was a close friend to the deceased and that on the material day, the deceased had come to her place. She requested a change of clothes as she wanted to wear something more revealing enroute

to the bar. The deceased left her clothes and the 1st appellant gave her the desired clothes and they left for the bar to drink beer. At the bar they met the 2nd appellant who was the boyfriend to the deceased. The deceased thereafter left the bar with 2nd appellant for his home. The 1st appellant remained at the bar looking for a man. She found a man and that is how she left.

The learned trial court found that the odd coincidences in the failure by the 1st appellant to tell PW1 and PW3 that she had left the deceased with the 2nd appellant supported the strong circumstantial evidence. The 1st appellant explained the failure to disclose at that time what transpired with the deceased to effect that she did not want to finish the friend's marriage.

The 2nd appellant's explanation is similar to that given by the 1st appellant. He added that after he went to his house with the deceased, they chatted for an hour after which he started escorting her. When they reached the bar, the deceased told him that she had found some friends in the bar and that she would go with them. He then went back to sleep. He was subsequently apprehended.

Learned Counsel for the respondent Ms. Nyangu argued that the 2nd appellant having elected not to give evidence supports the case against him.

She relied on the case of **Chimbini** *supra* where the Supreme Court stated as follows:

> **"Where the evidence against an accused person is purely circumstantial and his guilt entirely a matter of inference, an inference of guilt may not be drawn unless it is the only inference which can reasonably be drawn from the facts. In such cases the fact that an accused person has elected not to give evidence on oath may, in certain circumstances, tend to support the case against him but will certainly not do so unless the inference was one which could properly be drawn in the first place."**

To begin with, the suggestion that the appellant herein remained silent is incorrect. The record on the contrary shows that he gave unsworn evidence. In any event, our understanding of the holding in the **Chimbini** case *supra* is that even if an accused opted to remain silent, a trial court should only convict if an inference of guilty is one which could be properly be made. The submission by Counsel for the appellant is thus untenable.

Would it therefore be said, in the light of the explanations given, that an inference of guilty is the only one which could reasonable be drawn from the facts?

We find that the explanations given by the appellants could reasonably be true in the circumstances of this case. Had the learned trial court properly evaluated the evidence before it, he could have found that their explanations

could reasonably be true. Further, the 1st appellant explained to PW4, the arresting at the time of arrest how she moved with the deceased to a bar called Kasama busy to drink beer. The police should have investigated the story in order to verify its efficacy. We find this to be a dereliction of duty which further buttresses the possibility of the account given to be reasonably true.

We find force in the argument by Ms. Ponde that where there are a number of inferences which could reasonably been drawn from the facts, one favourable to the accused person must be drawn. We are therefore bound to allow the appeal.

In the circumstances, we find the appellants were convicted on unsatisfactory evidence. We quash the convictions and sentences of the 1st and 2nd appellant; they now stand acquitted.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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B. M. MAJULA
COURT OF APPEAL JUDGE

.....
K. MUZENGA
COURT OF APPEAL JUDGE