IN THE COURT OF APPEAL OF ZAMBIA **APPEAL 136/2020**
HOLDEN AT LUSAKA AND KABWE
(Criminal Jurisdiction)

BETWEEN:

SUSAN MWAPE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Ngulube, and Siavwapa, JJA

On 20th April 2021 and 21st October 2021

For the Appellant: M. Muzala, Legal Aid Counsel, Legal Aid Board

For the Respondent: R. Malibata-Jackson, Senior State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Mwewa Murono v The People [2004] Z.R. 207
2. Charles Lukolongo and Other v The People [1986] Z.R. 115
3. George Nswana v The People [1988-1989] Z.R. 174
4. David Zulu v The People [1977] Z.R. 151

5. Dorothy Mutale and Richard Phiri v The People [1995-97] Z.R. 227.
6. Saidi Banda v The People SCZ No. 30 of 2015
7. Kezzy Ngulube v The People SCZ judgment No. 10 of 2009
8. Makola Chilende and John Masakati v The People, SCZ Judgment No. 65 of 2017

LEGISLATION REFERRED TO:

1. The Penal Code, Chapter 87 of the Laws of Zambia
2. The Criminal Procedure Code, Chapter 88 of the Laws of Zambia

1.0. INTRODUCTION

1.1. The appellant, appeared before the High Court (Limbani, J.), on an information containing one count of the offence of murder contrary, to **section 200 of the Penal Code.**

1.2. The allegation was that on 3rd March 2019, at Kapiri-Mposhi, she murdered Jonathan Chanda Kabwe.

1.3. She denied the charge, and the matter proceeded to trial.

1.4. At the end of the trial, she was found guilty of committing the offence, and condemned to suffer capital punishment.

1.5. She has appealed against the conviction.

2.0. CASE BEFORE THE TRIAL COURT

2.1. The evidence before the trial judge, was that on 2nd March 2019, Jonathan Kabwe Chanda, a security guard, returned to his house in Kapiri-Mposhi's Soweto Compound, around 14:00 hours. He was in the company of his wife, the appellant.

2.2. He instructed the appellant to cook nshima for him because he was hungry. The appellant picked sweet potato leaves from their garden, which she cooked for relish.

2.3. At the time she was preparing the food, they were with their son, Chrispin Mulenga. However, he left before the appellant served the meal to her husband.

2.4. After having his meal, Jonathan Kabwe Chanda left for work. He arrived at his work place around 17:00 hours.

2.5. Not long after he arrived, he complained to Robert Chabale, a workmate, of being hungry and feeling dizzy. The complaint was also brought to the attention of Misheck Mulenga, who was the proprietor of a shop next to where Jonathan Kabwe Chanda was guarding.

2.6. Later that evening, Misheck Mulenga and Robert Chibale took Jonathan Kabwe Chanda to a clinic where he was admitted. He died in the course of the night.

2.7. The following morning, Misheck Mulenga went to inform the people at Jonathan Kabwe Chanda's house of his demise.

2.8. According to Misheck Mulenga, while he was at the house, the appellant told him that her husband had eaten poisoned relish. She showed him the vegetables and when he sniffed them, they smelt of poison. However, the appellant

claimed that the foul smell was because they were rotten.

2.9. Misheck Mulenga informed the police about the poisoned relish and they instructed him to apprehend the appellant, which he did.

2.10. On 5th March 2019, Detective Constable Chapwana, who was at the time stationed at Kapiri-Mposhi Police Station, took over investigations of the case. She was handed over the docket for the case. Also handed over to her, was some relish and a bottle of doom.

2.11. She did not visit Jonathan Kabwe Chanda's house, but attended the post-mortem examination of his body.

2.12. Following the postmortem, the pathologist handed over to her some body tissues. These where, part of the liver, some contents of the stomach and some blood. Together with the relish and bottle of doom, she took the tissues to a public analyst.

2.13. On 8th April 2019, the public analyst issued his report. He found that all the body tissues, the relish and the bottle of doom, contained dichlorvos, an organophosphate pesticide.

2.14. In his report, the pathologist opined that the cause of Jonathan Kabwe Chanda's death was acute respiratory failure due to poisoning.

2.15. In her defence, the appellant confirmed cooking the relish for her husband. She said she picked sweet potato leaves from their garden. She said after her husband had his meal, she dumped the remainder of the relish, in a pit and washed the pots. She later left the house.

3.0. FINDINGS BY THE TRIAL JUDGE

3.1. The trial Judge took the view that, the case against the appellant was anchored on circumstantial evidence.

3.2. He noted that toxicology examination of the stomach contents, blood and liver showed the presence of a pesticide and that death was due

to poisoning. He also noted that Jonathan Kabwe Chanda fell sick within a few hours of eating food cooked by the appellant.

3.3. There was also evidence that the appellant told Misheck Mulenga that the sweet potatoe leaves had been sprayed with an insecticide. A fact that was confirmed by Misheck Mulenga when he sniffed at the relish.

3.4. The trial judge found that it was odd and strange that when the appellant cooked the meal, only Jonathan Kabwe Chanda partook of it. In addition, the relish was thrown away and pot washed after he had eaten.

3.5. He also noted that although the appellant denied cooking for her husband when the police interviewed her and said she did not know whether the relish was poisoned, she had earlier on told Misheck Mulenga that they were poisoned.

3.6. The trial judge found that the recovery of the bottle of doom ruled the possibility that the

vegetables where sprayed by Jonathan Kabwe Chanda or any other person.

3.7. He concluded by finding that the only inference that could be drawn on the evidence that was before him, was that the appellant poisoned her husband.

4.0. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

4.1. The sole ground of appeal is that the fact that the appellant caused the death of her husband was not proved beyond all reasonable doubt

4.2. The first argument that Mr. Muzala advanced in support of the appeal, was that the public analyst's report, should not have been admitted into evidence. He pointed out that **section 192(1) of the Criminal Procedure Code,** required that the public analyst tenders the report in court, but he did not come to testify.

4.3. Mr. Muzala then referred to the case of **Mwewa Murono v The People**[1] and submitted that because of that omission, the prosecution failed to

discharge their obligation to prove each and every element of the charge of murder, beyond all reasonable doubt.

4.4. He pointed out that the appellant was implicated by evidence that she cooked the meal that turned out to be poisonous. However, evidence ruling out the possibility that the vegetable leaves she picked from the garden were not poisonous, was not led.

4.5. On the basis of the case of **Charles Lukolongo and Others v The People**[2], he submitted that that failure, amounted to a dereliction of duty.

4.6. Mr. Muzala also referred to the case of **George Nswana v The People**[3] and submitted that the trial judge should have considered the appellant's explanation of what transpired, as it could reasonably have been true. It is possible that the vegetables were sprayed with poison before she picked them, he pointed out.

4.7. Mr. Muzala concluded by referring to the cases of **David Zulu v The People**[4] and **Dorothy Mutale**

and Richard Phiri v The People[5] and submitting that since it was possible that the vegetables could have been sprayed before they were picked, an inference of guilt is not the only one that the trial judge could have been drawn on the evidence that was before him.

5.0. STATE'S RESPONSE

5.1. The respondents support the conviction.

5.2. In response to the argument that the public analysis report, should not have been admitted into evidence because the author did not testify, Mrs. Malibata-Jackson referred to the case of **Kezzy Ngulube v The People**[6] and submitted that in that case, a conviction was upheld, despite the public analyst not testifying.

5.3. As regards the argument that an inference of guilt, is not the only inference that could have been drawn on the evidence that was before the trial judge, Mrs. Malibata-Jackson referred to the case of **Saidi Banda v The People**[7] and

submitted that on the evidence before the trial judge, the only rational conclusion that he could have reached, is that the appellant caused her husband's death.

6.0. CONSIDERATION OF APPEAL AND COURT'S DECISION

6.1. The case against the appellant was anchored on the allegation that she caused the death of her husband through poisoning. The fact that he appellant's husband was poisoned, was proved. What is contentious is whether it is the appellant who administered the poison that caused that death.

6.2. We will first deal with the arguments on the admission of the public analyst's report.

6.3. We have had the opportunity of reading and appreciating the judgment in the case of **Kezzy Ngulube v The People**[8]**.** Mrs. Malibata-Jackson referred to that case in support of her argument that a public analyst's report can be admitted

into evidence, even where the author has not testified.

6.4. In that case, the admissibility of the public analyst's report was not contested. As a result, the Supreme Court did not deliberate on whether a report is admissible, even when the author has not testified.

6.5. It is therefore our view that the case of **Kezzy Ngulube v The People**[8], is not authority for the proposition that a public analyst's report can be admitted into evidence, even where the public analyst authored it did not testify.

6.6. **Section 192 of the Criminal Procedure Code**, deals with the admissibility of the evidence of a public analyst. It provides as follows:

> **(1) Whenever any fact ascertained by any examination or process requiring chemical or bacteriological skill is or may become relevant to the issue in any criminal proceedings, a document purporting to be an affidavit relating to any such examination or process shall, if purporting to have been made by any person qualified to carry out such examination or process, who has ascertained any such fact by means of any such**

> examination or process, be admissible in evidence in such proceedings to prove the matters stated therein:
>
> Provided that-
>
> (i) the court in which any such document is adduced in evidence may, in its discretion, cause such person to be summoned to give oral evidence in such proceedings or may cause written interrogatories to be submitted to him for reply, and such interrogatories and any reply thereto purporting to be a reply from such person shall likewise be admissible in evidence in such proceedings;
>
> (ii) at the request of the accused, made not less than seven days before the trial, such witness shall be summoned to give oral evidence.
>
> (2) Nothing in this section contained shall be deemed to affect any provision of any written law under which any certificate or other document is made admissible in evidence, and the provisions of this section shall be deemed to be additional to, and not in substitution of, any such provision.'

6.7. Our understanding of this provision is that a public analyst's report can be admitted into evidence, even if the author does not testify, if it is attested or in the format of an affidavit.

6.8. There is, however, an exception to that proposition. Sub-section (2) of the same provision, provides that a report requiring chemical or bacteriological skill, is admissible into evidence if there is a written law that allows its admission, even when it is not attested.

6.9. We have not come across any written law that would fit the public analyst's report that was produced in court, in this case, into the exception.

6.10. That being the case, the public analyst's report, which was produced in this case, should not have been admitted into evidence on the basis of **section 192 of The Criminal Procedure Code,** because it was not attested. In the premises, Mr. Muzala was on firm ground when he submitted that the report was not properly admitted into evidence.

6.11. But the issue does not end there.

6.12. As earlier set out, the appellant was incriminated by evidence linking her to the poisoning of her husband.

6.13. At the centre of that evidence, was the recovery of a bottle of doom and some relish. Both articles were found to contain the same poison as the one that killed the appellant's husband. This is the poison that was detected in the body tissues that were removed from his body.

6.14. Detective Constable Chapwana, the arresting officer, told the trial judge that on 5th March 2019, she was handed over the docket of the case. She was also handed over a bottle of doom and the relish that was suspected to have been poisoned. Together, with the body tissues, she took them to the public analyst.

6.15. There was no evidence before that court of where the bottle of doom and poisoned relish came from or who took them to the police station.

6.16. In the case of **Makola Chilende and John Masakati v The People[8],** the appellants, who had been

convicted for the offences of murder and aggravated robbery, argued, on appeal, that some exhibits that incriminated them, should not have been admitted into evidence because there was a break in the chain of their custody.

6.17. Lady Justice Muyovwe, who delivered the judgment of the Supreme Court, commenting on when there is a break in the chain of evidence, said the following:

> **'In our view, this occurs when an exhibit in the hands of the prosecution which they seek to produce cannot be identified or traced to anyone, for example, if the owner of the exhibit is unknown and it is not clear how it found itself in the hands of the witness who seeks to produce it'**

6.18. She also went on to say:

> **'In certain case, even an officer or a person who handled the exhibit is quite competent to produce it. There is no hard and fast rule but each case should be dealt with on its own peculiar facts'**

6.19. In this case, as we have just indicated, there is no evidence of where the bottle of doom and

the relish that the public analyst examined, came from. There is also no evidence of who took them to the police station.

6.20. According to Detective Constable Chapwana, she found the bottle of doom at the police station and it was handed over to her with the docket. In the case of the relish, although Misheck Mulenga talked about sniffing some relish at the invitation of the appellant, and apprehending her, he made no mention of collection of that relish and taking it to the police station.

6.21. In the circumstances, it is our view that there was a break in the chain of evidence. The source of the incriminating poisonous relish and bottle of doom, on which the appellant's conviction rested, is not known.

6.22. Can it be said that this case falls in the exception in which the arresting officer could still have produced them? We don't think so.

6.23. In the absence of any evidence of the person who collected and took those two articles to the

police station, there is no basis on which one can conclude that they were actually collected from the appellant's house.

6.24. These two pieces of evidence were crucial to the case against the appellant. They were the basis of the trial judge's conclusion that Jonathan Kabwe Chanda was poisoned by the appellant through the meal that she cooked for him.

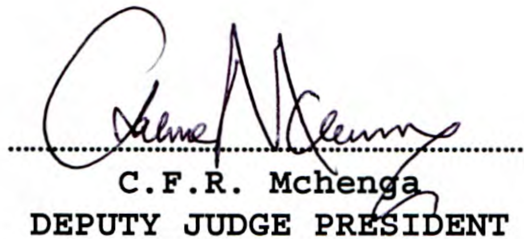
6.25. It is our view that even if the public analyst's report had been produced into court in the prescribed manner, properly directing himself, the trial judge, on the evidence before him, should have found that the case against the appellant, was not proved beyond all reasonable doubt.

6.26. The break in the chain of the evidence of the source of the poisonous materials raised doubts in the allegation that it was the appellant who administered the poison that killed her husband.

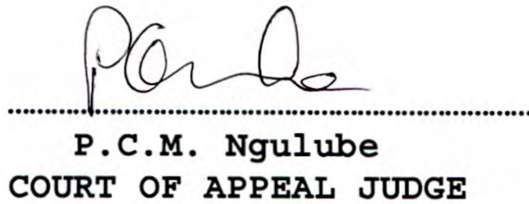
7.0. VERDICT

7.1. It is our finding that the conviction is not safe and satisfactory.

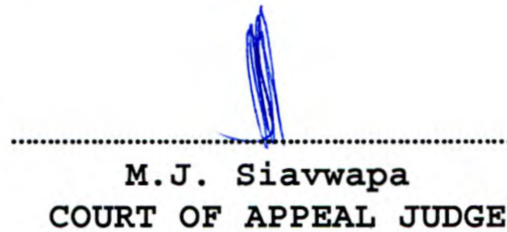
7.2. Consequently, we allow the appeal, quash the conviction and set aside the sentence.



C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



P.C.M. Ngulube
COURT OF APPEAL JUDGE



M.J. Siavwapa
COURT OF APPEAL JUDGE