IN THE COURT OF APPEAL OF ZAMBIA **Appeal No 182/2020**
HOLDEN AT LUSAKA AND KABWE
(Criminal Jurisdiction)

BETWEEN:

STEPHEN NGOBEKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Majula and Muzenga, JJA

On 19th May 2021 and 20th October 2021

For the Appellant: L.Z. Musonda, Legal Aid Counsel, Legal Aid Board

For the Respondent: M. Libuku, Senior State Advocate, National Prosecution Authority

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JUDGMENT

Mchenga DJP, delivered the judgment of the court

CASES REFERRED TO:

1. Dorothy Mutale and Richard Phiri v The People [1995-97] Z.R. 227.
2. Nicholas Malaya v The People SCZ Appeal No. 29 of 2017.
3. Lupupa v The People [1977] Z.R. 51.
4. Davie v Magistrate of Edinburgh [1953] S.C 34.
5. David Zulu v The People [1977] Z.R. 151

LEGISLATION REFERRED TO:

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

WORKS REFERRED TO:

1. Blackstone's Criminal Practice 2017, Oxford University Press, Oxford
2. Phipson on Evidence, Seventeenth Edition, Sweet & Maxwell, 2010
3. Forensic Medicine: A Text Book for Students and Practitioners, 10th Edition, J.& A. Churchill, London, 1955

1. INTRODUCTION

1.1. The appellant, appeared before the High Court (Muma, J.), on an information containing one count of the offence of murder contrary to **section 200 of The Penal Code.** The allegation was that on 10th September 2018, in Lusaka, he murdered Wilberforce Mwatikisha.

1.2. He denied the charge and the matter proceeded to trial.

1.3. At the end of the trial, he was found guilty of the charge and condemned to suffer capital punishment.

1.4. He has appealed against the conviction.

2. CASE BEFORE THE TRIAL COURT

2.1. The evidence before the trial judge, was that on 9th September 2018, in the evening, Wilberforce Mwatikisha and the appellant, were seen drinking beer at a bar, in Lusaka's Shantumbu Village. At around 22:00 hours, the two left the bar and were seen heading towards Wilberforce Mwatikisha's house, which was within the same village.

2.2. The following morning, on 10th September 2018, Wilberforce Mwatikisha was found dead in his house.

2.3. Later, that morning, the appellant turned up at a bar with Wilberforce Mwatikisha's phone. He was apprehended soon after he offered it for sale.

2.4. On the same day, Wilberforce Mwatikisha's body was subjected to a postmortem examination conducted by three doctors. In their report dated 7th May 2019, they set out their observations and findings as follows:

(a) Abrasions on left forehead, anterior neck, right elbow, left wrist

(b) Absence of bleeding into neck muscles, conjunctival hemorrhages, petechial hemorrhages and fracture of the hyoid bone

(c) Presence of food particles in the distal airways

Given the circumstances reported to us by the Police at the time of post-mortem, the above mentioned findings (a and b) can neither confirm nor refute the notion of manual strangulation. Although some authors are of the opinion that, the extent of external injury and internal injury in strangulations varies with the intensity of the assault and the resistance provided by the victim. On occasion, one maybe strangled without any external or internal evidence of injury. This may occur if someone was obtunded, intoxicated, or otherwise unconscious and unable to put up much resistance, enabling the assailant to use a reduced amount of force.

We are of the view that the external injuries are pre-mortem, however, we are unable to determine the exact period when this occurred. The presence of food particles in the distal airways (C) could be attributed to post-mortem events such as aspiration of vomitus especially in obtunded or intoxicated individuals or post-mortem events such as when moving the body from one place to another.

The blood alcohol level (405) milligrams %) is remarkably high and levels beyond 350-400 milligrams % have been associated with fatalities, though deaths have occurred with concentrations less than 350 milligrams %.

Given the equivocal preceding factors, we thus report the cause of death as undetermined. We therefore recommend that the post-mortem findings be interpreted in the context of the circumstantial evidence.

2.5. In his defence, the appellant did not deny attempting to sell Wilberforce Mwatikisha's phone on the morning that he was found dead. However, he

claimed that he had won it off him, the night before, after a bet at a game of pool.

3. FINDINGS BY THE TRIAL JUDGE

3.1. The trial judge found that the case against the appellant was anchored on circumstantial evidence. He was the last person to be seen with Wilberforce Mwatikisha before he was found dead. He was also found with his phone.

3.2. He rejected the appellant's claim that he won the phone off Wilberforce Mwatikisha after a bet at a game of pool, as there was no pool table at that bar where they were last seen drinking together.

3.3. The trial judge considered the possibility that Wilberforce Mwatikisha died from the consumption of alcohol and ruled it out. It was his view that had it been the case, he would not have suffered the abrasions seen on the left side of his forehead, anterior neck, right elbow and left wrist.

3.4. He concluded that the appellant 'strangled' Wilberforce Mwatikisha before stealing his phone.

4. GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

4.1. The sole ground of appeal is that an inference of guilt is not the only one that could have been drawn on the evidence that was before the trial judge.

4.2. The thrust of the appellant's case, is that the pathologists having concluded that the cause of death could not be determined, an inference of guilt is not the only one that could have been drawn on the evidence that was before him.

4.3. Mrs. Musonda also made reference to the case of **Dorothy Mutale and Richard Phiri v The People**[1] and submitted that the court should have considered inferences that were favourable to the appellant; that is, that he died from choking or the excessive consumption of alcohol.

4.4. Further, she argued that in the absence of evidence of a bad relationship between the two, the mere fact that the appellant was the last person to be seen with Wilberforce Mwatikisha, should not have

led to an adverse inference. The case of **Nicholas Malaya v The People**[2] was referred to in support of the proposition.

5. RESPONDENT'S ARGUMENTS

5.1. The State supported the conviction.

5.2. Mr. Libuku submitted that the external injuries observed on Wilberforce Mwatikisha, were not natural but inflicted by his assailant. It follows that he did not die a natural death but was strangled.

5.3. In response to the argument that more than one inference could be drawn on the circumstances in which Wilberforce Mwatikisha came to his death, Mr. Libuku referred to the cases of **Lupupa v The People**[3] and **Davie v Magistrate of Edinburgh**[4] and submitted that the pathologists duty was to provide the court with the facts on which it could make a decision.

5.4. He went on to argue that this being the case, the fact that they failed to determine the cause of his

death, did not preclude the trial judge from arriving at his own conclusion.

5.5. He also argued that the principle in the case of **Dorothy Mutale and Richard Phiri v The People**[1], was not applicable to this case because only one inference could be drawn on the evidence that was before the trial judge; that the appellant had caused his death.

6. CONSIDERATION OF APPEAL AND COURT'S DECISION

6.1. The issue that this appeal raises, as we see it, is whether the fact that Wilberforce Mwatikisha died as a result of the attack he suffered at the hands of the appellant, was proved beyond all reasonable doubt. This is because in a charge of murder, there must be a link between the offenders conduct and his victim's death.

6.2. In his judgement, the trial judge made the following observation:

> **"In this matter before me, there exist an issue of blood alcohol level of 405 milligrams % found in the**

deceased, which was remarkably high, but the presence of alcohol alone cannot cause abrasions on the forehead, exterior neck and right elbow, left and right fracture hyoid bone, for the doctor to suspect strangulation.

Therefore alcohol is dispelled as being the cause of death.

I am satisfied that it was the accused who strangled the deceased to death and got away with the phone which he was subsequently found in possession of and failed to explain how he acquired it.

Therefore the circumstantial evidence before me has taken the case out of the realm of conjecture and the inescapable inference is that the accused strangled the deceased to death."

6.3. From the foregoing, it is apparent that the trial judge came to the conclusion that the appellant strangled Wilberforce Mwatikisha after excluding the possibility of his death being on account of the consumption of excessive amounts of alcohol, because of the injuries seen on his body.

6.4. In the cerebrated case of **David Zulu v The People**[5], the Supreme Court, held that it is competent for a court to convict on circumstantial evidence. The court went on to note as follows:

> **'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.'**

6.5. Further, in the case of **Dorothy Mutale and Richard Phiri v The People**[1], Ngulube, C.J., delivering the judgment of the Supreme Court, made the following observation, on the approach, when more than one inference can be drawn from the evidence:

> **'The case rested on the drawing of inferences. Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favorable to an accused if there is nothing in the case to exclude such inference. The circumstantial case in this appeal did not exclude the more favorable references. The factors urged by Mr. Malama were all valid. It is, of course, quite possible and the suspicion in this regard is very strong that - as Mr. Mukelabai suggested - the incidents at the market and on Bombesheni Road were related. However, there is that lingering doubt on**

> **account of the various matters herein discussed and we are required by the criminal law to resolve such doubts in favour of the accused since the conviction is then rendered unsafe and unsatisfactory.**

6.6. In **Blackstone's Criminal Practice,** at page 2411, paragraph F1.18, the editors have said the following on circumstantial evidence:

> **'Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused stick the victim'. Circumstantial evidence is evidence of *relevant facts*, i.e. facts from which the existence or non-existence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.'**

6.7. In this case, the appellant was linked to the commission of the offence by direct evidence that he was the last person to be seen with Wilberforce

Mwatikisha before he was found dead. The other direct evidence implicating him was his possession and attempt to sell, Wilberforce Mwatikisha's phone.

6.8. As regards what caused Wilberforce Mwatikisha's death, the direct evidence from pathologists was that:

(i) He had abrasions on left forehead, anterior neck, right elbow and left wrist;

(ii) He did not bleed in the neck muscles nor was the hyoid bone fractured;

(iii) food particles were present in the distal airways; and

(iv) the alcohol level in his blood was at 405 milligrams per cent.

6.9. There was also opinion evidence from the pathologists, who were experts, as to how he could have died.

6.10. In **Phipson on Evidence,** page 1075, at paragraph 33-10, the following is said about the evidence of an expert:

'There is an important if elusive distinction to be made in the categorization of expert evidence. It is generally accepted that there is a difference between evidence of fact and evidence of opinion, notwithstanding that it may be difficult to identify the line which divides the two. It is also well understood that in practice a witness of fact may not be able entirely to disentangle his perceptions from the inferences he has drawn from them. Although the courts often talk of "expert evidence" as if it were a single category, representing in every case an exception to the rule against the reception of opinion evidence, it is suggested that a similar distinction exists in the evidence of experts, and it is one which has considerable relevance both to the procedural aspects and to the assessment of the weight of expert evidence. Expert witnesses have the advantage of a particular skill or training. This not only enables them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to a lay witness. The latter might simply be described as "scientific evidence", the former as "expert evidence of opinion".'

6.11. The opinion evidence provided by the pathologist on how Wilberforce Mwatikisha died was to the effect that:

(i) The abrasions seen on his forehead, interior neck, elbow and wrist were suffered before he died;

(ii) Even though there was no bleeding in the neck muscles or fracture of the hyoid, it is possible that he could have been strangled. They pointed out that where a person is intoxicated or unconscious person, very little force can be applied to strangle without leaving any visible injury. However, in this case, they could not confirm or rule out that it was the case or

(iii) Death by choking could have been caused by food particles in his distal airways. In this case it is possible that he could have aspired vomit on account of being intoxicated and choked but it is also possible that the food particle found themselves in there when the body was moved after he had died.

(iv) As regards the blood alcohol level, levels of between 350-400 milligrams %, or less, are

known to cause death, but some people can still survive with levels of up to about 1000 milligrams %.

6.12. From foregoing, it is clear that the pathologists, who had knowledge of the circumstances in which Wilberforce Mwatikisha's body was recovered, because they were told by the police, could not come to a conclusion of how he died.

6.13. They indicated that there were three possible scenarios of what happened. He could have died from strangulation, choking from food particles or excessive intake of alcohol. They were unable to indicate which one was the case.

6.14. Despite this failure, the trial judge still proceeded to consider, and rightly so in our view, what caused Wilberforce Mwatikisha's death. This approach was correct as it is in line the decisions in the cases of **Lupupa v The People**[3] and **Davie v Magistrate of Edinburgh**[4].

6.15. However, given that the pathologists had opined that there were three possibilities of how death could

have occurred, it is our view that the trial judge should have considered and discounted the other two, before settling in on death by strangulation.

6.16. We have just indicated that it is within a trial judge's right to accept or reject the opinion of the experts. But it is also our view, that as the trial judge embarks on such a journey, he must give reasons for rejecting or accepting a particular the possibility.

6.17. In this case, the trial judge ruled out the possibility of death by intoxication because of the bruises Wilberforce Mwatikisha had on his body. He did not indicate why he had arrived at that conclusion that he died from strangulation in the face of evidence that there was no bleeding in the neck muscles or fracture of the hyoid bone. This fact is what made the pathologists not confirm that death was by strangulation.

6.18. According to Sydney Smith's **Forensic Medicine** page 247, asphyxia, is the cause of death where there is strangulation. Asphyxia 'is the result of

interference with the respiratory function whereby the organs and tissues are prevented from obtaining the supply of oxygen essential to life'.

6.19. It is also pointed out that the interference may be through the:

(1) **Closure of the external respiratory orifices, as in smothering by closing the nose and mouth with the hand or by a cloth, or by filling these openings with mud or other substances.**

(2) **Closure of the air passage by external pressure on the neck, as in hanging, strangulation, throttling, etc.**

(3) **Closure of the air passages by the impaction of foreign bodies in the larynx and pharynx, as in choking.**

(4) **Prevention of access of air owing to the air passages having been filled with fluid, as in drowning.**

(5) **Prevention of breathing by preventing the normal movements of the chest, as in death from pressure on the chest in a crowd, from the collapse of the sides of an excavation or from the collapse of a building.**

6.20. If death was by asphyxia in this case, it is possible that it was by reason of his nose and mouth being blocked or by choking from the food. There is still

the unresolved question of alcohol in the blood, which the pathologists did not totally exclude, as the cause of death.

6.21. We agree with Mrs. Musonda that in the face of three possible causes of death, two of which were possibly independent of the appellant, the holding in the case of **Dorothy Mutale and Richard Phiri v The People,** should have been deployed in the appellant's favour.

6.22. The fact that the appellant was found with Wilberforce Mwatikisha's phone, may suggest that he attacked him and was responsible for the abrasions seen on his body. But that was not enough, there was need for evidence confirming that the attack is what caused his death.

6.23. In the premises, it is our view that properly directing himself, the trial judge would have found that the allegation that Wilberforce Mwatikisha met his death as a result of injuries inflicted by the appellant, was not proved beyond reasonable doubt.

6.24. The case was not proved beyond all reasonable doubt because an inference that the appellant caused

Wilberforce Mwatikisha's death is not the only inference that could have been drawn on the evidence before him.

6.25. This being the case, the sole ground of appeal succeeds.

7. VERDICT

7.1. Having considered all the circumstances of this case, we find that the conviction is unsafe and unsatisfactory.

7.2. Consequently, the appeal is allowed. The conviction is set aside and the sentence quashed.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B. M. Majula
COURT OF APPEAL JUDGE

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K. Muzenga
COURT OF APPEAL JUDGE