

IT

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

APPEAL NO. 115/2021

BETWEEN:

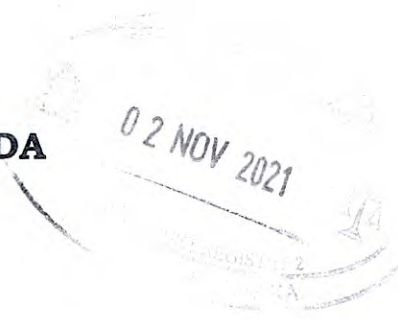
SINYEMBA MUNGANDA

APPELLANT

AND

THE PEOPLE

RESPONDENT



Coram: Malila, Kaoma and Chinyama, JJS.

On 13th July, 2021 and on the 2nd November, 2021.

For the Appellant : *Mr. M. Mankinka, Senior Legal Aid Counsel, Legal Aid Board.*

For the Respondent : *Mrs. M. A. Simuchimba, Senior State Advocate, National Prosecutions Authority.*

J U D G M E N T

CHINYAMA, JS, delivered the Judgment of the Court.

Cases referred to:-

1. *Mutale and Phiri v The People* (1997) SJ 51
2. *Webster Kayi Lumbwe v The People* (1986) ZR 93

- 1.0** The appellant was convicted in the Mongu High Court by Hamaundu J., as he then was, for the offence of Murder contrary to section 200 of the Penal Code on the allegation that he, on 5th August, 2011 at Shangombo in Western Province, murdered Kafuko Muyunda. He was sentenced to death. The appellant was the accused in the Court below. We will, in this judgment use the term “accused” and “appellant” interchangeably.
- 2.0** The conviction was based on circumstantial evidence. The circumstantial evidence was that on 5th August, 2011 the deceased left his village in the morning headed for an area called Mbopuma. Shortly after the deceased’s departure, the appellant arrived at PW1’s homestead with an axe which he proceeded to hone or sharpen before he took off in the direction taken by the deceased. PW1 and PW3 saw the deceased arrive and go away with the axe. The two witnesses were familiar with the appellant’s axe because they used to use it. It was alleged that there was a brewing feud involving accusations that the deceased had bewitched the appellant who fell ill. Around midday, the deceased was found by PW2 lying alongside a path

near Mbopuma with injuries to the head. When PW2 returned to the scene with the deceased's relatives, they found the deceased dead. An axe handle was found near the body of the deceased. PW1 and PW3 recognised the axe handle as being part of the axe they had seen the appellant with earlier that morning. In Court, the two witnesses identified the axe (handle with blade) because they were familiar with it. There is no dispute that the deceased was hacked with an axe which caused his death.

3.0 The appellant's defence was that on 5th August, 2011 he, too, left the village in the morning around 06.00 hours. He went to Namaondo village to look for a person called Richard Akakulubelwa from whom he wanted to buy a drum. On that mission, he was selling tobacco as well. He did not find Akakulubelwa and he spent the night in Namaondo. The next day he returned to his village after failing to meet Akakulubelwa. In the village, he found that the deceased had died. He was accused of killing the deceased. At the trial, the appellant denied having gone to PW1's homestead the previous day or in the direction which the deceased had taken. He denied

knowing the axe or that PW1 used to borrow it from him. He denied knowing anything about the alleged practice of witchcraft by the deceased or that he fell ill because he was bewitched by the deceased. The appellant, however, testified that he was related to the deceased as well as PW1 and PW3 who were his uncles and cousin respectively and that they all lived in the same village. He stated that he used to get along well with the deceased but not PW1 and PW3 who harboured a grudge against him over cattle. He could not recall his mother accusing the deceased of causing the appellant's illness through witchcraft.

4.0 The learned trial Judge accepted the circumstantial evidence given by the witnesses for the prosecution. He reasoned that the prosecution witnesses were very positive that they knew the axe (as the appellant's) because they had been using it as well; that PW1 and PW3 were able to identify certain features of the axe (at the trial). Further, that the appellant and the witnesses were related and lived in the same village. He discounted the appellant's alibi that on the day and at the time in issue, he was in another place where he had gone to see a man named Richard

Akakulubelwa in Namaondo Village. He opined that the explanation was not clear; that it was also not clear why he did not meet Akakulubelwa.

5.0 The learned Judge, based on the foregoing, found as facts that in the morning on 5th August, 2011, the appellant was seen by PW1 and PW3 heading in the direction that the deceased had taken while carrying his axe; that around midday the appellant was seen again returning to the village without the axe. The axe handle was later discovered besides the deceased's body, as it were. The learned Judge was of the view that there was no evidence that the appellant's axe could have changed hands at some point before the murder. Therefore, that although the evidence was circumstantial, it had removed the case out of the realm of conjecture and had attained such a degree of cogency that it could only permit an inference of guilt on the part of the accused. He, therefore, concluded that the appellant had struck the deceased with the axe and thereby killed him. He found that the Prosecution had proved the case of murder against the accused beyond reasonable doubt, found him guilty and convicted him accordingly.

6.0 The Appellant appealed to this Court on one ground, namely that:-

The learned trial Court erred in law and in fact when it convicted the appellant on circumstantial evidence which had not taken the case out of the realm of conjecture so as to permit only one inference of guilt as there were other possible inferences to be drawn.

7.0 In support of the foregoing ground of appeal, Mr. Mankinka, on behalf of the appellant, submitted that there was nothing distinct or peculiar about the axe handle which could have distinguished it from other axe handles owned by other residents in the community. Therefore, that the axe handle recovered besides the body of the deceased could have belonged to any other person in the area.

8.0 Counsel also criticised the acceptance of the Prosecution's version of the events based on what the Court found to be unclear explanations by the appellant why he spent a night in another village and still failed to meet Akakulubelwa. Learned Counsel contended to the effect that there was no obligation on the appellant, as we understood the argument, to make such explanation. Counsel reiterated, citing the case of **Mutale and**

Phiri v The People¹, that there are other inferences in the case which point to the innocence of the appellant such as that the axe belonged to someone else in the area. That the appellant's story that he was not the one who killed the deceased could reasonably be true having been away at the material time. We were urged to uphold the appeal, quash the conviction and set aside the sentence.

9.0 Responding to the appeal, Mrs. Simuchimba submitted that there are several pieces of evidence that led to the conclusion that the appellant committed the murder, namely, that the appellant had the requisite motive to kill the deceased who was accused of having bewitched the appellant; that the appellant was seen going with an axe in the direction in which the deceased had gone, shortly before; that an axe handle was found besides the deceased's body; that the axe handle was identified by PW1 and PW3 as belonging to the axe that they had seen with the appellant that morning when visibility was clearly good; that PW1 and PW3 were familiar with the axe because they used to borrow it from the appellant to whom they were related; and relying on the case of **Webster Kayi Lumbwe**

v The People², (in which it was held that an appellate Court will not interfere with a trial Court's finding of fact on the issue of credibility unless it is clearly shown that the finding was erroneous) that the trial Court found the Prosecution's evidence to be credible based on what the Court saw of and heard from the witnesses. We were urged to dismiss the appeal and uphold the conviction and sentence.

10.0 We have considered the appeal as well as the contending positions taken by the parties. The issue, as aptly captured in the sole ground of appeal, is whether the circumstantial evidence adduced in this case was so cogent as to take it out of the realm of conjecture to permit only an inference of guilt to be drawn as the law requires.

11.0 Circumstantial evidence can manifest itself as a singular strand or piece of evidence or in several strands or pieces of evidence, which when taken together lead to the inevitable conclusion that the accused is the person that committed the offence.

12.0 The Prosecution presented circumstantial evidence comprised in several strands as pointed at by Mrs. Simuchimba particularly dealing with the sighting of the appellant in the

morning of the fateful day and the identification of the axe handle which we referred to in paragraph 9.0 above. The learned trial judge was clearly impressed by the evidence of PW1 and PW3. In the judgment, the learned judge stated the following-

I have considered the two versions. The prosecution's witnesses were very positive that they had used the accused's axe as they lived in the same village with the accused and were related. PW1 and PW3 were able to identify, positively, certain features of the axe. The accused's version was not clear as to why he decided to spend a night in another village. The version was also not clear as to why the accused failed to meet the person he had gone for, even after spending a night in that village. Therefore, I accept the prosecution's version.

13.0 It is clear to us that the Court accepted the identification evidence of the axe by PW1 and PW3 based on their familiarity with it which enabled them to point out certain features on it. This identification evidence could not have left any room for the witnesses to confuse the axe with any other axe belonging to another person in the community. As to whether the two witnesses saw the appellant with the axe that morning, we are bound to agree with the finding by the trial Court based on what

Mrs. Simuchimba alluded to in her submission that the trial Court found the Prosecution's evidence to be credible based on what the Court saw of and heard from the witnesses. Indeed, a finding of fact based on the credibility of a witness cannot be displaced unless it is demonstrated that the finding was erroneous as held in the **Webster Kayi Lumbwe** case. To merely allege that the accused did not get along with a witness called by the prosecution is not enough. It had to be shown why the witness should not be believed on the occasion at which the witness was testifying. Nothing of that sort has been brought out in this appeal. We are, therefore, equally satisfied that PW1 and PW3 saw the appellant with the axe in the village that morning and that he followed in the direction that the deceased had gone a short while ago.

14.0 We do not agree with Mr Mankinka's criticism of the learned trial Judge's comments that the accused's version was not clear why he spent the night in the village where he claimed to have gone and why he failed to meet the person that he had gone to see. This is because the learned Judge was merely resolving issues of fact based on the credibility of the witnesses after he

saw and heard the witnesses. In any case, the learned Judge found as a fact that in the morning of 5th August, 2011 the appellant was seen by PW1 and PW3 heading in the direction the deceased had gone; that the two witnesses again saw the appellant around mid-day coming back to the village without his axe and later the handle of the axe was found besides the body of the deceased. If at all the appellant spent the night in Namaondo village, he must have left again after he was seen returning to the village around mid-day by PW1 and PW3.

15.0 Coincidentally, as stated in his defence, the appellant confirmed leaving the village that same morning, 5th August, 2011. The explanation that the appellant had gone to Namaondo village or that he wanted to meet with Akakulubelwa for whatever reason was of no consequence in this matter. What is material is that he confirmed having left the village that morning. This evidence and our agreeing with the finding by the trial Court that he was seen by PW1 and PW3 the same morning, placed the appellant within the vicinity of the scene of crime. As it turned out an axe handle of the axe that the appellant was seen with was found where the deceased's body was discovered. As pointed out by

the trial Court, there was no evidence that the axe had changed hands from the appellant to another person in the interim. The inescapable inference from the foregoing strands of circumstantial evidence is that the appellant was the perpetrator of the crime. Therefore, we are satisfied that the circumstantial evidence is so cogent that it has taken the case out of the realm of conjecture permitting only the conclusion that it is the appellant who killed the deceased.

16.0 We, accordingly, find no merit in the appeal and we dismiss it.

We uphold the conviction and the sentence imposed.



DR. M. MALILA

SUPREME COURT JUDGE



R. M. C. KAOMA

SUPREME COURT JUDGE



J. CHINYAMA

SUPREME COURT JUDGE