IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 60/2021**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

EMMANUEL MBEWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
25 JUL 2022
CRIMINAL REGISTRY 1
P.O. BOX 50067, LUSAKA.

CORAM: Mchenga DJP, Sichinga and Muzenga JJA
On 18th January, 20th April and 25th July, 2022.

For the Appellant: Captain Nanguzyambo, Messrs FB Nanguzyambo & Co.

For the Respondent: Ms M.T. Mumba, Chief 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. **Goba v The People (1966) ZR 113**
2. **Fabias Habayumbe and Obvious Habayumbe v The People – Appeal No. 129/130 of 2017**
3. **Mbinga Nyambe v The People (2011) ZR 246 (SC)**
4. **Chrispin Soondo v The People (1981) ZR 302**

Legislation referred to:

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

2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**
3. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was convicted of murder contrary to **Section 200 of the Penal Code**[1] and was subsequently sentenced to death by the High Court (before Mr. Justice K. Limbani).

1.2 The particulars of the offence alleged that the appellant, between 14th and 15th September, 2019 at Kapiri Mposhi in the Kapiri Mposhi District of the Central Province of the Republic of Zambia did murder Gideon Mubanga.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The prosecution called a total of six witnesses.

2.2 A summary of the evidence of PW1 Catherine Namusukwa was that on the evening of 14th September, 2019, while at her bar she witnessed the appellant dragging the deceased home while very annoyed. Later, around 22:00 hours after closing the bar, she heard a person shouting outside her house that the appellant was beating his wife. She rushed to see what was going on and she found a mob of people who were

trying to open the door to the appellant's house. One of the neighbours called the police who later picked up the appellant and his wife. It was her further testimony that the following day she heard that the deceased was found dead in a well.

2.3 The evidence of Regine Sambo, PW2, was that on the fateful day, the appellant went to her house and told her he did not want the deceased to be found at her bar. He further told her that if he found the deceased at the bar, he will kill the deceased. She further told the trial court that at around 22:00 hours she asked her husband to wake up as the accused was beating his wife. It was her testimony that the following day, PW4, the sister to the deceased asked her if she had seen the deceased.

2.4 In cross-examination, PW2 stated that when the appellant told her that he would kill the deceased, he was not too drunk.

2.5 PW3 was the wife to the accused person. After she gave her particulars, there was an objection raised and she was barred from giving evidence by the trial court.

2.6 The evidence of Annie Mwape (PW4), a child aged 10 was received after *voire dire.* She was the young sister to the deceased who recalled

that on 14th September, 2019 she was at home with her mother while the deceased was at the bar. The appellant later came home with the deceased whom he beat with a stick, screwdriver, stone and slasher. She told the trial court that the appellant went on to beat her mother after the deceased stopped crying. She testified that she gave the keys for the house to their neighbours so that they could unlock the grill door to rescue her mother. She narrated that when the deceased stopped crying, she thought he had gone to his uncle's place and later the police got the appellant.

2.7 She told the trial court that the following day she started searching for the deceased. During her search she saw blood trails behind the house that led her to the well where she found his body. She found a stick by the well, a stone behind the house, a slasher in the house behind the door and a screwdriver outside by the door.

2.8 In cross-examination, she stated that she did not know why the appellant fought with the deceased.

2.9 Christopher Kasonde, the uncle of the deceased testified as PW5. He stated that he attended the post-mortem examination of the deceased. He told the trial court that the results of the examination revealed that

he had blood clots in the head, a fractured right leg and left arm with a swollen face.

2.10 The arresting officer, Inspector William Kanyimbo, testified as PW6. His evidence was to the effect that on 15th September, 2019 he was assigned to investigate a case of murder wherein the appellant was alleged to have killed his stepson. He visited the scene of the crime with other police officers where he found the body of the deceased in a well with some blood around the scene. He told the trial court that he checked a nearby house and saw blood stains on the front and the wooden kitchen door. That when the deceased's body was retrieved from the well it had bruises on both hands, the face and forehead. He testified that he interviewed several people and later made up his mind to warn and caution the appellant. PW6 made up his mind and charged the appellant with murder.

2.11 In cross-examination, he stated that the well where the deceased's body was retrieved was about 10 metres deep. The appellant told him that he beat the deceased after he insulted him and that he did not want his deceased stepson to be visiting their house. PW6's investigations revealed that both the deceased and the appellant had

on a material night taken some alcohol and that his examination of the deceased's body did not reveal any wound or cut that may have been caused by a slasher.

2.12 That generally marked the close of the prosecution evidence. The appellant was found with a case to answer and was placed on his defence. He opted to give evidence on oath and called one witness.

3.0 THE DEFENCE

3.1 The appellant told the trial court that on 14th September, 2019 on his way home from work he stopped by a tavern to pay a debt he owed. He bought some Chibuku beer and started off for his house. While on the way, the deceased who was in the company of his friends insulted him by stating that he was not his father. That when he reached home he looked for his wife who was not there. He then went to his friend's house. His friend's wife gave him a bottle of beer and as he was heading back home he saw the deceased who followed him and started insulting him.

3.2 When he got to the door of his house, the deceased started beating him and throwing stones at him. He told the trial court that he got the deceased, locked the house and started beating him. Later he let him

out of the house. The deceased continued throwing stones which annoyed him. He chased him and when he caught up with him, he hit the deceased with his fists, kicked him and head-butted him. After which he run into the house and locked himself inside the house. When he got into the house he was annoyed and started beating his wife. A mob of people gathered outside their house and a police officer later arrived and took him to the police. At this time the deceased was outside and had come with stones. He told the trial court that to his surprise the following day he was arrested for murdering his stepson.

3.3 In cross-examination, he denied having differed with PW1 and PW3. He stated that he only had a confrontation with the deceased after he insulted him. He agreed that on the material day, he had taken some beer but he was not drunk.

3.4 Gerard Mumba Mumena testified as DW2 and his evidence was to the effect that on 14th September, 2019 around 21:30 hours he was at a bar drinking beer with two more other patrons whom he did not know. After a short while, they were joined by a young man who was insulting. It was his testimony that he asked the young man to leave. The young man left and went to a nearby house some 35 metres away.

He later heard noise, someone throwing stones and a male person crying. The young man was throwing stones while someone was crying. He went there, found the young man was holding stones and crying. He also found a vehicle and another man was being taken.

3.5 When he inquired as to what was happening, he was told that the man who was being taken fought with the other man who had stones. He told the trial court that he later came to learn that the man who was being taken in the car was the appellant. He testified that the other man with stones remained behind crying. The following day he came to learn that the man who stood with stones was found dead and his body was in a well.

3.6 In cross-examination, he stated that he was told that the appellant fought with the young man. He stated that when he saw the deceased at the bar, he was drunk and made noise. He was insulting and violent but did not have any weapons.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The learned trial court stated that it was clear from the evidence that on the material night the accused did beat the deceased and that he intended to kill the deceased as per his own words which were

confirmed by PW1 and PW2. The trial court found that despite having taken beer, the appellant was not drunk so as to diminish his responsibility. The court also found that the discipline instituted by the appellant was excessive, disproportional to the provocation and not how any reasonable father or stepfather could have acted under a similar circumstance. The appellant was convicted and sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with both conviction and sentence, the appellant appeals to this Court on three grounds of appeal as follows:

(1) The trial court erred in law and fact when accepting the evidence of PW3, a child of tender years after a defective *voire dire.*

(2) The trial court erred in law and fact when it convicted the appellant against undisputed evidence which points to the appellant having been apprehended and detained for assault on his wife.

(3) The trial court erred in law and fact when it convicted the appellant on circumstantial evidence against the weight of evidence.

6.0 THE APPELLANT'S ARGUMENTS

6.1 In support of ground one, the learned counsel for the appellant contended that the trial court did not conduct a proper *voire dire* as

evidenced by its ruling as follows: **"the witness possesses sufficient intelligence to give evidence on oath, let us proceed."** Counsel contended that the ruling by the trial court fell short of the required standard of a proper *voire dire*. She stated that a proper *voire dire* should reflect that the child of tender age possesses sufficient intelligence and understands the duty to tell the truth.

6.2 Counsel argued that a child may rightly and truly be intelligent but intelligence is not synonymous with truth. Similarly, a child may appreciate the duty to tell the truth but may lack the required intelligence to enable them to testify before the court, hence the requirement laid down to ensure both limbs are satisfied. To this end, we were referred to the case of **Goba v The People**[1] where it was held that: **"when no proper *voire dire* is carried out the evidence should be discounted entirely."**

6.3 In support of ground two, counsel contended that there is unchallenged evidence on the record which indicates that at the time the appellant was arrested for assaulting his wife, the deceased was in good health and was seen holding stones. That in light of the unchallenged evidence of the appellant's alibi, the court below was

wrong in convicting him. We were urged to allow the appeal on this ground.

6.4 In support of ground three, it was contended that the trial court is competent to convict on strong circumstantial evidence and that for circumstantial evidence to be regarded as strong it must have attained a degree of cogency permitting only an inference of guilt. Counsel submitted that there was insufficient evidence to link the appellant to the death of the deceased. It was counsel's submission that the conviction was unsafe as the whole case hinges on circumstantial evidence which was weak as it failed to attain a degree of cogency which could permit only an inference of guilt.

7.0 RESPONDENT'S ARGUMENT

7.1 Learned counsel for the respondent argued that the trial court was on firm ground when it accepted the evidence of PW4 a child of tender age after a successful *voire dire*. It was counsel's contention that even though the trial court did not state in the ruling that PW4 appreciated the duty to tell the truth, the *voire dire* that the trial court conducted was in line with the rules set out in **Section 122 of the Juveniles Act[2].** Counsel urged us to make an assessment of PW4's capacity to

appreciate the duty to tell the truth from the questions that the trial court asked and the answers to the said questions. We were referred to our judgment in the case of **Fabias Habayumbe and Obvious Habayumbe v The People**[2] where we stated that the fact that the trial court only recorded one question made it difficult for us to assess whether the child answered the question or questions he was asked by the court properly.

7.2 In the alternative, it was submitted that in the event we find the testimony of PW4 defective due to a defective *voire dire*, the remaining evidence is sufficient to support the conviction of the appellant.

7.3 In respect of ground two and in response to the argument by counsel for the appellant to the effect that there was sufficient evidence on the record to show that the deceased was present at the scene at the time the appellant was being taken to the police station, counsel contended that if the deceased was truly present at the scene, armed with stones as stated by DW2, the police officers could have also carried him since he was violent. It was submitted that the circumstantial evidence as to how the deceased met his death and how his body was found in the well is so compelling that only an inference that the appellant is the

one who killed the deceased can be arrived at in line with the case of **Mbinga Nyambe v The People[3].**

7.4 In response to ground three, counsel argued that given the circumstances of the case and the evidence on the record, the trial court was on firm ground when it convicted the appellant on the totality of the evidence. We were urged not to allow the appeal.

8.0 THE HEARING

8.1 At the hearing of this appeal, learned Counsel for the appellant Captain Nanguzyambo adopted and placed reliance on the arguments filed by the Legal Aid Board. He added *viva voce* that since the trial court found that a failed defence of provocation amounted to extenuating circumstance, he implored us to impose any other sentence. Learned counsel for the respondent, Ms. Mumba, Chief State Advocate informed the Court that she would rely on the filed heads of argument in opposition.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by both parties and the Judgment sought to be assailed.

9.2 We wish to note on the onset that the trial court decided to renumber the witnesses in its judgment. This created a confusion even for advocates when they were making the submissions. This is because the trial court after receiving the particulars of PW3, the wife to the deceased, and following an objection by the defence, the trial court declined to continue receiving her evidence. The numbering on the recording continued, with the next witness being PW4. This was the correct way to proceed. Unfortunately and for unknown reasons, the trial court in its judgment decided to renumber without any explanation. On reading the judgment, one would not know how many witnesses were called and the reasons, if any, for declining to continue or accept their evidence.

9.3 We wish to advise trial courts that the judgment should be reflective of what transpired in court. A note should be made of what happened and the numbering of witnesses should continue and be in conformity with the record. That having been said, we shall proceed to determine the appeal.

9.4 Because of the position we have taken in this appeal, we shall not consider the merits or demerits of this appeal. This is as a result of

the trial court declining to receive the evidence of PW3, the wife to the appellant.

9.5 Captain Nanguzyambo, objected to the PW3 continuing giving evidence against the appellant, following being prompted by the trial court. In his ruling, the trial judge stated that in the absence of a firm exception to the general rule, the spouse cannot be allowed to testify against the husband.

9.6 The Supreme Court in the case of **Chrispin Soondo v The People**[4] stated that:

> **"The learned trial magistrate found corroboration in the evidence of two other prosecution witnesses who in fact were fellow accomplices: they were each found in possession of part of the stolen and slaughtered animal. To make matters worse, the learned trial magistrate failed to observe that the evidence of PW2 was inadmissible: she was the wife of the second accused. In the case of R v Mount & Metcalfe (2) the wife of a co-accused gave evidence for the prosecution against her husband and the two appellants. Charles, J., observed at p. 136:**
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> > **"All that evidence was absolutely inadmissible. It has long been held that at common law a wife is not only a compellable, but not even a competent, witness against her husband. That principle was enunciated with regard to a case where prisoners are charged jointly in Thompson (3), where it was made quite clear that, where two or more persons are indicted jointly, the wife or husband of any such defendant is not an available witness against any co-defendant.**

The offence under consideration does not fall within the exceptions, statutory or otherwise, to the above rule. PW2 was therefore not a competent witness for the prosecution and her evidence was completely inadmissible."

9.7 Learned counsel for the appellant actually referred to this case when objecting to PW3 giving evidence. We wish to state that the foregoing is a common law position. There are some exceptions. In fact, the Supreme Court noted the existence of exceptions to the general rule in respect of spouses.

9.8 **Section 151 (1) of the Criminal Procedure Code**[3] provides as follows:

"In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person –

(a) in any case where the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person;

(b) in any case where such person is charged with an offence under Chapter XV of the Penal Code or with bigamy;

(c) <u>In any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of</u>

<u>such person or the children of either of them.</u>
(Emphasis ours)

9.9 It is thus clear from **Section 151** that a spouse of an accused person is competent to testify against the accused person without the accused person's consent as long as the case falls within the exceptions in **Subsection 1(a), (b)** or **(c).**

9.10 In this case, the appellant's wife was competent to testify in this matter as the deceased was her child even without the consent of the appellant. The trial court fell into grave error when it declined to receive her evidence.

9.11 We have also noted that the learned trial court omitted to make an important finding which relates to credibility. PW4 told the trial court that at the time the police were picking the appellant, the deceased was not there. On the other hand, the appellant and DW2 told the trial court that at the time the police were picking the appellant, the deceased was present and was still holding stones. It is common cause that the deceased was discovered in a well the following day. Therefore, if at the time the accused was taken to the police, the deceased was there and wielding stones, that finding may affect the

verdict of the trial court. We hold the view that this is an important finding which the trial court ought to have made.

9.12 We are disinclined to consider the merits of this appeal to avoid prejudice. In light of the foregoing shortcomings in the court below and in the interest of justice, we hereby order that this matter be sent back to the High Court for retrial before another judge.

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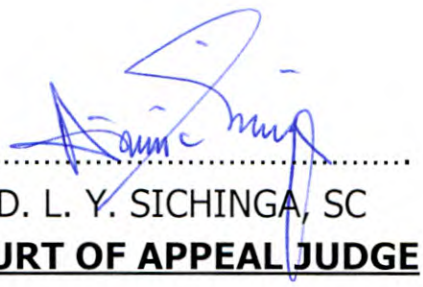
C. F. R. MCHENGA

DEPUTY JUDGE PRESIDENT



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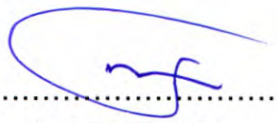
D. L. Y. SICHINGA, SC

COURT OF APPEAL JUDGE



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K. MUZENGA

COURT OF APPEAL JUDGE