

IN THE COURT OF APPEAL
HOLDEN AT NDOLA
(Criminal Jurisdiction)

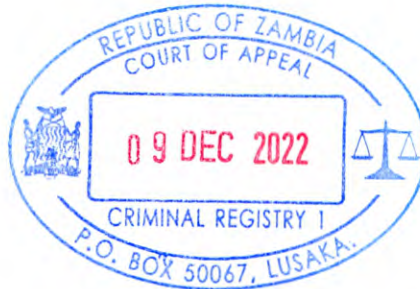
CAZ APPEAL/26/2021

BETWEEN:

LILLIAN MWALE

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: MCHENGA DJP, KONDOLO SC, BANDA-BOBO, JJA

On 16th November 2021 and 9th December, 2022

For the Appellant : Mr. M Makai, Legal Aid Counsel Legal Aid Board

*For the Respondent : Mr. S Simwaka, Senior State Advocate – National
Prosecution Authority*

J U D G M E N T

KONDOLO SC, JA delivered the Judgement of the Court

CASES REFERRED TO:

- 1. Mbinga Nyambe v The People (2011) ZR 246**
- 2. David Zulu v The People (1977) ZR 151**
- 3. Kalebu Banda (1977) ZR 169**
- 4. Saluwema v The People (1965) ZR 4 (CA)**
- 5. Dorothy Mutale & Richard Phiri v The People (1977) SJ. 51 (SC)**
- 6. Kaposa Muke & Another v The People (1983) ZR 94 (SC)**
- 7. Ezious Munkombwe & Others v The People CAZ/7,8,9/2017**
- 8. National Justice Compania Naviera SA v Prudential Assurance
[1987] 1 Lloyds Reports 379**
- 9. Shawaza Fawaz & Another v The People (1995) ZR 2, 12**

10. Woolmington v The DPP (1935) ALL ER 1

LEGISLATION REFERRED TO:

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

1. INTRODUCTION

- 1.1. The Appellant has appealed against conviction on a charge of Murder, contrary to **Section 200** of the **Penal Code**, by the High Court in a judgment delivered by Lady Justice C.B. Maka- Phiri.
- 1.2. The particulars indicated Lilian Mwale, the Appellant murdered Luka Tuombe in Livingstone on a date unknown but between 23rd October, 2019 and 20th January 2020.
- 1.3. We shall refer to the Accused in the High Court as the Appellant throughout the judgment.

2. HIGH COURT PROCEEDINGS

2.1. Prosecution's Case

- 2.2. The evidence shows that the Appellant went with PW1 to drink beer at a place called Mikes car wash until around 22:00 hours when PW1 and her friend took the Appellant home.
- 2.3. PW1 did not witness any altercation between the Appellant and her husband, Luka, the deceased. She did however receive two conflicting phone calls later

that night, one saying that the deceased had stabbed the Appellant with a screwdriver and later on another phone call saying that the Appellant had stabbed the deceased with a knife on his neck.

- 2.4. Queen Sobe PW2, the couple's landlord, testified that the deceased had told her earlier that evening that he and his wife, the Appellant had differences which he wanted to reconcile.
- 2.5. The Appellant arrived as they were talking and she went straight into her husband's house. PW2 didn't take a proper look at her but she seemed drunk. According to PW2, the deceased was sober.
- 2.6. A short while later the Appellant knocked on PW2's door and when she opened for her, the Appellant said the deceased had killed her and if PW2 didn't take her to the clinic quickly she was going to die. PW2 opened the zip observed some blood on the dress.
- 2.7. PW2 declined and said they should go with the deceased and when they got to house she found the door locked from the outside and the Appellant said she had locked it because she was scared that the deceased was going to kill her.

- 2.8. PW2 entered the house and she heard the deceased panting and when she turned, she saw the Appellant dashing towards the gate and PW2 screamed for help. The Appellant was caught with the help of another lady who asked the Appellant what she had done to him and she answered by saying it was not her but him who wanted to kill her.
- 2.9. They went back to the house and by that time a crowd had gathered. PW2 saw the deceased lying on the floor, in a lot of blood, face down and completely naked. She also observed two knives on a doormat by the bedroom.
- 2.10. PW2 said she did not see any wounds on the Appellant but was crying saying she was dying.
- 2.11. PW2 confirmed that both the deceased and the Appellant were admitted in hospital
- 2.12. In cross examination, PW2 reiterated that she did not see any stab wound on the Appellant but only saw blood on the top of her dress.
- 2.13. PW3 was Dr. Muchelenganga Muchenga, a forensic pathologist. He testified that he received an order for post mortem and when he enquired about the circumstances of death he was informed that the deceased had died in the UTH after a long admission.

- 2.14. After further enquiry he was informed that the deceased was admitted because he was failing to swallow properly. He was also informed that the deceased was admitted to Livingstone General Hospital with a stab wound to the neck but was referred to UTH for further management.
- 2.15. PW3 explained that he reviewed the UTH clinical notes and saw the death certificate. He stated that the body was very emaciated and of note were scars on the right side of the neck.
- 2.16. PW3 looked at the lungs and found the presence of pneumonia. He then informed the court that he proceeded to make an opinion based on the history, circumstances and autopsy findings that the cause of death were complications for (sic) the treatment of a stab wound to the neck
pneumonia was the immediate cause of death, the proximate cause of death is the stab wound to the neck.
- 2.17. The Post Mortem Report was shown to PW3 and he was asked to read out the portion that states as follows; ***This post-mortem examination ... No injuries identified that could potentially be attributed to the death.***
- 2.18. In cross examination PW3 stated that he opined that the pneumonia could have been transmitted during the

deceased's hospital stay because it was a common occurrence in patients who are not mobile but just lie in bed

- 2.19. **PW4 was Domdos Siasikabole** who informed Court that he was one of the doctors who treated the deceased at Livingston General Hospital. He said the deceased had multiple lacerations and a small deep wound on the right side of the neck which was also swollen. He also had lacerations on the abdomen and deep lacerations on the scrotum with skin hanging. The lacerations were all treated.
- 2.20. PW4 stated that he could not tell if the wounds were self-inflicted but that only a person in an altered mental state could make such a deep cut on his scrotum after stabbing himself in the neck.
- 2.21. He explained that the deceased was admitted on three occasions. And the surgical findings after the third admission were that all the wounds had healed but the patient had difficulties in swallowing and would vomit whatever he ate and he was wasted.
- 2.22. A barium swallow test was conducted to establish why he had difficulty in swallowing but nothing was established. The deceased was then referred to the UTH for an endoscope which is a superior test.

- 2.23. PW4 stated that he was unable to tell whether the wounds were self-inflicted.
- 2.24. PW5 was Detective Constable Elijah Chabala, a scenes of crime officer. He told the Court that the Appellant reported that she had been wounded by her husband and PW5 observed some cuts on her neck and issued her with a medical report form.
- 2.25. Five minutes later the deceased was brought to the police station by PW2 who informed the court that he had been injured by his wife and could neither walk nor talk. PW5 examined the deceased and observed deep wounds on his neck, belly and abdomen and a big open cut on his scrotum.
- 2.26. PW5 visited the scene the following day and found blood all over the place including on clothes and on the bed. He recovered two knives from the scene of which one had blood stains.
- 2.27. He visited the hospital but was unable to interview the couple because they were still undergoing treatment.
- 2.28. In cross examination PW5 stated that the Appellant had deep wounds on her neck and a cut on her right hand and another on her right ear.
- 2.29. He said no finger prints were uplifted from the knives. He stated that both the Appellant and the deceased were

admitted in hospital but he was unable to interview them because they were ill.

2.30. PW6 was Bruce Limbambala, the investigations officer who told the court that he was allocated the docket for this matter but he was unable to interview the deceased immediately after the incident because he was in critical condition.

2.31. The deceased was discharged on 29th October, 2019 and PW6 interviewed him on 1st November, 2019 and he informed PW6 that he was stabbed by his wife the Appellant, and at the time they were actually on separation.

2.32. PW6 said that he had been monitoring the deceased and observed that he was in and out of hospital until he passed away at UTH.

2.33. PW6 informed the Court that on one occasion he interviewed the Appellant and the deceased together and the deceased said his wife stabbed him many times and she said she was equally stabbed by him.

2.34. PW6 said the deceased made conflicting statements and at one point he told PW6, in the presence of his relatives that he did not want the matter to go to court and in fact in his initial statement he told PW6 that he did not know who stabbed him

2.35. Under cross examination PW6 agreed that the Appellant denied the charge saying it was not her who stabbed her husband but her husband who stabbed her.

2.36. PW6 admitted that the Appellant also had injuries, was admitted and upon being discharged was also in and out of hospital.

3. APPELLANTS EVIDENCE IN THE LOWER COURT

3.1. The Appellant told the court that on 23rd October, 2019 around 18:00 she went to drink beer at Mikes Car wash and left around 21:30 hrs.

3.2. She and her friend booked a taxi after they left Mikes Car Wash and she decided to pass through her husband's home to pick up some clothes. Her and her husband were on separation.

3.3. The Appellant stated that when she got to the house, she found her landlady PW2 talking to the deceased within the yard. She greeted them and told the deceased that she had come to pick up some clothes and he motioned her to go inside the house.

3.4. She failed to find her clothes and when she was on her way out of the house she found the deceased in the sitting room. He closed the main door and asked her what she had been telling his relatives and she said he had told them nothing.

- 3.5. He told her that there was no way their marriage could end and he squeezed her neck and pushed her towards the bedroom. She told him he was going to kill her and he let her go and went back into the sitting room.
- 3.6. She followed him so as to exit the house and she found him connecting his phone to the stereo. He pushed her back into the bedroom and onto the bed on her back. He jumped on top of her stabbed her with a knife on her neck three times. She also sustained injuries on her right hand and behind the neck.
- 3.7. The Appellant said she screamed but the immediate neighbors were not at home and there was music playing.
- 3.8. She couldn't remember how long the ordeal took but when he finished stabbing her, he went to the sitting room. She had no energy so she fell and he came back to the bedroom, switched off the light and poured water on her and said ***“mother of Vanessa forgive me I didn't want to do that”*** and he screamed very loudly and it became quiet.
- 3.9. The Appellant realized she had lost a lot of blood and she stood up, exited the house, closed the door and rushed to the landlord's house and told the landlord that her husband had stabbed her and asked that she be taken to the police station and to the hospital as she could die.

- 3.10. The landlord said they should go and pick her husband but the Appellant said she was scared that he would finish her off and so she went to the roadside to look for a taxi. However, the landlord followed her and asked that they go back the house as her husband had died.
- 3.11. The Appellant told the Court that she was scared to follow because she thought the deceased had sent the landlord to take her back so that he finishes her off. She proceeded to get a taxi which took her to the police station. She passed out and woke up in the casualty department at the hospital and found that her wounds had been stitched. Her ribs were broken and she was discharged after three days.
- 3.12. When asked who stabbed the deceased, the Appellant said she didn't know.
- 3.13. She stated that the deceased was discharged from hospital after about 4 days and he phoned her to find out how she and their child were doing and to apologize for stabbing her and stabbing himself with a knife. She asked him to tell his relatives the truth and said she used to record the conversations for the purpose of using them as evidence in Court.
- 3.14. The deceased informed the Appellant that he was feeling sick and throwing-up and went to the hospital where he was

given medicine and released. He continued throwing-up on and off until he was referred to UTH.

3.15. The police told her that he died on 20th January, 2020 after which she was arrested and charged with the offence of murder.

3.16. The trial judge admitted the phone recordings into evidence, the salient part of which was a plea from the Appellant to tell his relatives exactly what happened. The deceased simply stated, a number of times that he would just speak the truth.

3.17. The Appellant further told the Court that whenever the deceased and her quarreled and she threatened to leave the house he in turn threatened that he would kill himself.

3.18. Under cross examination, the Appellant agreed that on the material day the deceased had bought her a 6-meter length of chitenge but she said that was not a sign that he still loved her and wanted her back home.

3.19. She said she went to pick up her clothes, in the night, after drinking beer and not earlier in the day because the deceased was not home during the period.

3.20. It was put to her that the way she described the manner in which the deceased sat on her when he was stabbing her, she would have sustained a deep cut and she agreed.

- 3.21. She was referred to her medical report which showed that she only suffered soft tissue injuries despite claiming that she was stabbed three times.
- 3.22. The Appellant opined that the deceased's wounds were self-inflicted because nobody else entered the house apart from the two of them.
- 3.23. She was referred to an X-ray taken on the 25th October, two days after the fateful night and she admitted that it showed that her ribs were not broken.
- 3.24. It was put to the Appellant that she did not challenge PW2's evidence that she looked drunk when she turned up at the deceased's house. She conceded to that fact.
- 3.25. The Appellant stated that her husband was not a psychiatric patient and she agreed that the deceased was sober on that fateful night.
- 3.26. DW2 was Mavis Banda Mwale, the Appellant's mother whose evidence was similar to the Appellants.

4. DECISION OF THE HIGH COURT

- 4.1. In considering the evidence before her, the trial judge found that the Appellants story collapsed during cross examination when she conceded that she ran away from the scene despite being told that her husband was dead.

- 4.2. The trial judge noted that contrary to the serious injuries and broken ribs the Appellant alleged she had suffered, the medical report she produced showed that she only suffered soft tissue injuries from the stab wounds and that her ribs were okay.
- 4.3. The court rejected the defense's submission that the injuries sustained by the Appellant were defensive wounds because there was no evidence on record of a struggle between the Appellant and the deceased.
- 4.4. The trial judge considered the serious injuries suffered by the deceased and agreed with the medical evidence led by PW4 that wounds of that nature and intensity could not have been self-inflicted.
- 4.5. The trial Judge further accepted PW4's evidence that the deceased was admitted into hospital on three occasions with the last admission on account of the deceased experiencing difficulties in swallowing and was vomiting.
- 4.6. The lower court referred to the Post Mortem (p. 228 and 233 of the record of appeal) and noted that it indicated that the cause of death was complications (pneumonia) for the treatment of the stab wound to the neck. That PW4 testified that pneumonia was the immediate cause

of death whilst the stab wound on the neck was the proximate cause of death. That the pneumonia may have been acquired during the deceased's long admission. The trial judge stated that she was therefore satisfied that the act of stabbing the deceased by the assailant was connected to the immediate cause of death, that the deceased did not thus die of natural causes.

- 4.7. The trial judge considered the Appellants submission that the failure by the police to lift finger prints from the knives suspected to have been used in the stabbing, amounted to dereliction of duty but she found that, in this instance, it didn't because there was evidence that the surfaces of the knife handles were such that finger prints could not be lifted from them. That the finger prints lifted from the Appellant was procedural as finger prints are routinely lifted from all accused persons.
- 4.8. The trial judge held that the audio recordings did not aid the appellant as in them the Appellant was clearly heard saying that he had told the police that the Appellant had stabbed him and this had infuriated her.

She also, however found that the deceased was actually trying to shield his wife from prosecution.

4.9. The judge then shifted to resolving the question as to who stabbed the deceased. She observed that there were no eye witnesses to the stabbing, meaning, that the prosecution was premised on circumstantial evidence. She noted that it was trite law that a court could convict on circumstantial evidence where the guilt of an accused person is the only inference that can be drawn from the facts in issue. In support of this she cited the cases of **Mbinga Nyambe v The People**⁽¹⁾ and **David Zulu v The People**⁽²⁾.

4.10. The trial judge observed that there were only two people in the house when the deceased was stabbed, there was no question of the presence of a third party, meaning that the Appellant had the opportunity to stab the deceased and cause the injuries that led to his death.

4.11. The lower court found that with regards motive, evidence of the record showed that the Appellant used to receive persistent reports about the deceased womanizing, including with PW2, whom she found her talking to when she turned up at the deceased's house on that fateful night. The trial judge found that this constituted motive.

- 4.12. The trial judge noted that she had already dismissed the notion that the deceased's wounds were self-inflicted. That being the case, the only inference was that it was the Appellant who had stabbed the deceased because there was nobody else in the house at the material time.
- 4.13. The judge found that the Appellant had malice aforethought when she brutally stabbed the deceased on the neck, abdomen and scrotum because she ought to have known that her action would cause death or grievous bodily harm to the deceased.
- 4.14. The Appellant was accordingly convicted of murder without extenuating circumstances and sentenced to death.

5. THE APPEAL

- 5.1. The Appellant appealed by filing a single ground of appeal as follows;

- 1. 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 guilty as there were other possible inferences to be drawn.**

5.2. APPELLANTS ARGUMENTS

- 5.3. It was submitted that the Appellants recollection of events was consistent and remained the same throughout her

testimony. That the testimony of all the prosecution witnesses aligned with what she had told each one of them.

- 5.4. It was further submitted that when on the audio recording the Appellant impressed upon him to tell the truth and the deceased's reaction of saying that he would speak the truth, implied that what he had told the police was not true.
- 5.5. It was pointed out that to the contrary, the deceased was not consistent because he initially told the police that he didn't know who had stabbed him but after the police took statements from other witnesses he was re-interviewed and the arresting officer said that it took all day for the deceased to give him a satisfactory statement as to what had transpired.
- 5.6. According to the Appellant's counsel, the deceased was forced to change his statement and it was clear that he did not want the case against his wife to proceed.
- 5.7. It was argued that the police were derelict because despite having ample time, they did not bother to obtain a written statement from the deceased to corroborate the Arresting officer's narration of what the deceased told him. The case of **Kalebu Banda** ⁽³⁾ was cited and it was opined that the court should assume that the written statement would have been favorable to the Appellant.

- 5.8. Counsel for the appellant submitted that the Appellants testimony with regard to why she locked the house and as to why she ran away from the scene was consistent in that both were done because she feared for her life, thinking that the deceased was alive and was going to kill her.
- 5.9. It was argued that the trial judge's finding on the question of the police's failure to uplift finger-prints was flawed because the record showed that the arresting officer was cross examined vigorously on the issue and he admitted that the two knives had metal parts which were smooth in texture and the failure to uplift finger prints was thus a dereliction of duty and the principle in **Kalebu Banda v The People (supra)** should apply.
- 5.10. Counsel for the Appellant attacked the trial judge's finding that there was no evidence of a struggle to support the defence submissions that the wounds sustained by the Appellant were defensive wounds. He referred to page 101 lines 8 to 20 of the record of appeal which clearly show that the Appellant tried to defend herself by trying to hold the deceased's upper hand hence the defensive wounds on the right hand and behind the neck.
- 5.11. With regard to the wounds suffered by the deceased it was opined that regardless of what the doctor (PW4) said, it was

reasonably possible because under cross examination PW4 stated that self-inflicted wounds could be deep or superficial depending on the intent of the self-infliction.

5.12. The defence concluded that it was thus clear that an inference of guilt was not the only possible inference, meaning that a conviction on circumstantial evidence could not be sustained. The cases of **Saluwema v The People** ⁽⁴⁾ and **Dorothy Mutale & Richard Phiri v The People** ⁽⁵⁾ were referred to.

5.13. **RESPONDENTS ARGUMENTS**

5.14. The Respondent commenced its arguments by submitting that the trial Court did not err in convicting the Appellant on the basis of circumstantial evidence because the evidence presented to the court was of such cogency that it left only a presumption of guilt.

5.15. It was submitted that the audio recordings presented by the Appellant did not in any way state that the deceased had stabbed the accused and then stabbed himself but as correctly found by the judge the deceased told the Appellant that he had told the police that she had stabbed him and this infuriated the Appellant.

5.16. With regard to the submission that the deceased initially stated that he didn't know who attacked him but was forced

to change his statement, it was pointed out that at page 69 lines 23 to 24 of the record, PW6 clearly stated that the deceased told him that he was stabbed by the Appellant but was reluctant to let the case proceed to court because she was his wife.

5.17. The State opined that there was no dereliction of duty at all as the failure to produce the statement of the deceased was a non-issue because the statement was not akin to a dying declaration or *res gestae*.

5.18. The prosecution insisted that the judge correctly found that there was no dereliction of duty on the part of the police because there were no proper surfaces upon which the could lift finger prints. They cited the case of **Kaposa Muke & Another v The People** ⁽⁶⁾ where the Supreme Court held that the police can only be liable for failure to lift fingerprints if there is in fact a surface suitable for lifting fingerprints.

5.19. With regard to motive, it was submitted that the audio recording established that the deceased had complained that she was receiving information that the deceased was entertaining other women in her absence.

5.20. The prosecution cited the case of **Ezious Munkombwe & Others v The People** ⁽⁷⁾ in which this Court stated that:

“when considering a case anchored on circumstantial

evidence, the strands of evidence making up the case against the Appellants must be looked at in their totality and not individually”.

5.21. The prosecution identified the following strands;

1. Motive as discussed in 5.19 above.
2. Opportunity arising from the fact that the Appellant and the deceased were together and alone in the house.
3. The judge accepted PW4's evidence that the deceased's wounds were not self-inflicted.

5.22. It was further pointed out that, as noted by the trial judge, the Appellant's behavior of leaving the premises after she had been told that the deceased was in the house badly injured, was strange.

5.23. It was submitted that the audio recordings introduced by the Appellant clearly showed that she was trying to influence the deceased to alter the statement he gave to the police.

5.24. That when looked at together, these strands left no room for any other explanation as to who stabbed the deceased and the only reasonable inference that can be drawn from the facts, is that the Appellant stabbed the deceased.

6. THE HEARING

6.1. At the hearing Counsel for the Appellant submitted that they would rely on the filed heads of argument.

6.2. Mr. Simwaka on behalf of the State, likewise, relied on their filed heads of argument but decided to augment. He noted that the post mortem report indicated that the cause of death was complications (pneumonia) for the treatment of stab wound to the neck. He added that it mattered not that the endoscopy was not done because the chain of events leading to the deceased's demise were well catalogued.

7. DECISION OF THIS COURT

7.1. We have considered the record of appeal as well as the arguments advanced by the parties.

7.2. The defence argued some specific points of law with regard to alleged dereliction of duty on account of the prosecution failing to lift fingerprints from the two knives which were the supposed murder weapons. Both parties cited the **Kalebu Banda Case (supra)**.

7.3. In that regard, it is not in dispute that whilst the blades of the two knives had rough handles, unsuitable for lifting fingerprints, the blades presented a perfect surface for doing so. It is certainly not true that everybody who lifts a knife only touches the handle, the smooth side of the blade can easily come into contact with a handler's fingers. Whether or not that happened can only be determined by trying to lift fingerprints from the said surfaces.

- 7.4. However, that failure alone should not necessarily result in a favorable outcome or an acquittal for an accused person because the consequences of the failure must be measured against the rest of the evidence in the matter.
- 7.5. The prosecution opined that its failure to produce the deceased's statement and relying on the arresting officer's recollection of what he was told by the deceased was a non-issue as it was not akin to *res gestae* or a dying declaration.
- 7.6. The converse is actually true because for the statement of a deceased person to be relied upon, it must fall under the exceptions to hearsay which are dying declarations and *res gestae*. Outside of the exception, such a statement is hearsay and requires corroboration. *In casu*, the only probative value of what PW6 told the Court with regard to what the deceased told him, is the fact that he placed the Appellant at the scene of crime during the material period. This evidence was corroborated by the testimony of PW2 and of the Appellant herself.
- 7.7. The only dispute is with regard to what transpired between the deceased and the Appellant in the deceased's house on that fateful night. Other than the two of them, one of whom is deceased, there were no eye witnesses and which is why the trial judge correctly held that the allegation of murder

against the Appellant was in the realm of circumstantial evidence.

7.8. On the submission by the defence that the deceased was forced to change his statement we refer to page 72 line 11-16 of the record of appeal, which shows that PW6 said that in the first interview he had with the deceased, the deceased told him that he did not know who had *attacked him until witnesses such as PW2 said it was the Appellant, "that's how he gave another statement, that was agreeable to the statement that was given by the other witnesses."*

7.9. This clearly shows that the second statement was influenced by what the other witnesses had said. This, however, has little to do with the truth or veracity of the statement because the deceased could have changed his statement because it was obvious that his initial statement was clearly ridiculous. The two statements must be considered in the context of all the evidence available to the Court.

7.10. With regard to the trial judge's finding on the audio recording, we agree with the Appellant that nowhere in the record does it show that the deceased stated in the audio recording that he had told the police that he and his wife had stabbed each other.

- 7.11. Despite this fact, the recordings are, on the other hand unhelpful to the Appellant's case because nowhere does the transcript show that the deceased stated that the appellant was not the one who stabbed him.
- 7.12. The Appellant's Counsel invested a lot of time in trying to convince the trial court that the injuries suffered by the deceased were self-inflicted whilst those suffered by the Appellant were inflicted by the deceased.
- 7.13. We have considered the submissions in that regard and the evidence of PW3 and PW4 and as well as the ghastly nature of the injuries suffered and we have arrived at the inescapable conclusion that the injuries suffered by the deceased were not self-inflicted.
- 7.14. The question to be decided in this regard, is, who inflicted the wounds on the deceased? This is where the circumstantial evidence comes to bear.
- 7.15. PW2 testified that the Appellant found her and the deceased talking near the deceased's house and she entered the house. The deceased followed her after which PW2 went to her house.
- 7.16. The Appellant confirmed that only she and the deceased were in the house but she didn't know who stabbed him even though the manner in which the prosecution witnesses were

cross examined made it clear that her position was that he stabbed her and then stabbed himself.

7.17. We have considered the strands of circumstantial evidence set out by the prosecution, namely;

1. *Motive was established;*
2. *The Appellant was the only other person at the scene;*
3. *The idea that the deceased self-inflicted the wounds has been thrown out.*
4. *The Appellants behavior after PW2 told her that her husband had been killed was inexplicable.*

7.18. We must hasten to add our observation that the superficial injuries suffered by the Appellant exposed the fact that the Appellant over dramatized her allegation that the deceased had tried to kill her by stabbing her. If his alleged attack on her was anything close to the way she described it in her testimony, she would have suffered very serious injuries.

7.19. We are in no doubt at all that, when woven together, the different strands of circumstantial evidence form a strong fabric and point to the fact that the only inference that can be drawn from the facts is that the stab wounds suffered by the deceased were inflicted by the Appellant.

- 7.20. We shall now consider whether the prosecution proved beyond a reasonable doubt that the deceased died as a result of the stab wounds to his neck.
- 7.21. The evidence of the State Pathologist PW3, indicated the cause of death on the post mortem as **“Complications (pneumonia) for the treatment of a stab wound to the neck.”**
- 7.22. PW3 was an expert witness whose primary function was to assist the court in reaching its decision by providing independent expert/technical analysis and opinion on the deceased’s cause of death, based on the information provided by those instructing him. Such evidence should provide as much detail as is necessary to convince the Court that the opinion is well founded.
- 7.23. Some of the duties of an expert witness were neatly set out by Creswell J in the case of National **Justice Compania Naviera SA v Prudential Assurance** ⁽⁷⁾ as including the following;
1. *Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*

2. *An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an Advocate.*

3. *An expert witness should state the facts or assumptions upon which his opinion is based.*

7.24. In the case of **Shawaza Fawaz & Another v The People** ⁽⁸⁾, the Supreme Court held as follows;

“When dealing with the evidence of an expert witness a Court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the Court to come to its own conclusion based on the findings of the expert witness.”

7.25. We note that page 3 of the Pathologists report at page 230 of the record of appeal states as follows;

History

Historical and investigative information about the case is provided to me by the coroners Order for Postmortem Examination, hospital records from UTH, and through conversation with the investigating officer(s) prior to postmortem examination.

This 33-year-old man died in the University Teaching Hospital during admission for a stab wound to the neck. He was initially admitted to Livingstone General Hospital but later transferred to the UTH.

7.24 The highlighted portion of the preceding paragraph was repeated as the Summary and Opinion on page 5 of the report at page 232 of the record of appeal.

7.26. When examined in chief, PW3 stated at page 36 of the record of appeal, that ***pneumonia was the immediate cause of death whilst the proximate cause of death was the stab wound to the neck.***

7.27. According to **Black's Law Dictionary, Eighth Edition, 2004**, proximate cause is defined as "*a cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor.*"

7.28. The authors of **Black's** go further and provide an interesting perspective of proximate cause as follows;

" 'Proximate cause' – in itself an unfortunate term – is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the

consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation ... As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy ..."

7.29. *In casu*, the allegation against the Appellant is that she is responsible for the death of the deceased because her attack on him was the proximate cause of death. In other words, if she had not stabbed him he would not have contracted the pneumonia that killed him. According to PW3 the deceased may have contracted pneumonia because of his prolonged admission arising from the stab wounds.

7.30. We note that page 6 of the post mortem report at page 233 of the record of appeal indicated that, "*the pneumonia **may** have been acquired during his hospital admission.*" (emphasis

ours) and we pay particular attention to the use of the word “may”. We shall revert to this point later.

7.31. The concept of proximate cause of death does not shift the burden of proof placed on the prosecution by the case of **Woolmington v The DPP** ⁽⁹⁾ The prosecution can only rely on the concept by showing that the chain of causation from the alleged proximate act was not broken at any point all the way up to the immediate cause of death.

7.32. *In casu*, PW3’s assertion that the deceased was hospitalized for a long time is not supported by the evidence on record. The arresting officer PW6 told the court that the deceased was discharged on 1st November, 2019. Having been admitted on 23rd October, 2019 his initial stay in hospital lasted 8 days.

7.33. PW4, stated that the deceased was admitted on three occasions. The duration of the admissions was not established and no reference was made to the length of time in-between admissions.

7.34. It is important to note that despite two admissions after being initially discharged, the record does not disclose that the deceased was suspected of suffering from pneumonia at any point. In fact, he was referred to the UTH for an endoscopy but he died before it could be done and as earlier

stated, the cause of death was listed as "*Complications (pneumonia) for the treatment of a stab wound to the neck.*"

7.35. We have also observed that in the narration under History on page 3 of the pathologist's report at page 230 of the record of appeal, the pathologist indicated that the deceased died at the UTH during admission for a stab wound. This was factually wrong because the evidence on record shows that the deceased was transferred to the UTH to undergo an endoscopy to establish why he was throwing-up and experiencing trouble swallowing. He was not admitted for a stab wound.

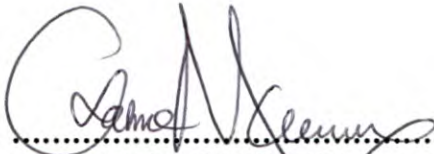
7.36. In considering the cited cause of death, we refer to paragraph 7.30 herein, where we earlier said we would revert to the use of the word "may". In our view, the use of the word "may" implies that there was a possibility that the deceased might have caught the pneumonia elsewhere.

7.37. Our understanding is that the stab wounds were considered as the proximate cause of death because they allegedly caused the deceased to be hospitalized for a long time, thereby exposing him to the risk of contracting pneumonia. The argument was not that the stab wounds caused the pneumonia.

- 7.38. This means that the prosecution had the burden to prove the nexus between the stabbing and the pneumonia. The nexus required proof that the pneumonia was contracted on account of hospitalization arising from the stabbing.
- 7.39. As earlier surmised, the durations the deceased spent inside and outside hospital are not clear and the post mortem report says he “may” have contracted pneumonia whilst admitted in hospital. This situation creates a cocktail of uncertainty that falls short of the standard of proof beyond reasonable doubt required to secure a conviction.
- 7.40. The evidence shows that the stab wounds healed and the reason why the deceased was vomiting and experiencing trouble swallowing was still being investigated.
- 7.41. It appears to us that the nexus between the stabbing and the pneumonia was not established and we disagree with the Pathologist’s finding that the stab wounds were the proximate cause of death.
- 7.42. The prosecution has failed to discharge its burden of proof to secure a conviction for murder contrary to **section 200 of the Penal Code**. The conviction is therefore quashed and the sentence is accordingly set aside.

8. CONCLUSION

- 8.1. Having established that the circumstantial evidence proved that the Appellant brutally and viscously stabbed the deceased leaving him with serious wounds, we find that the prosecution did, on the evidence, prove a case of **causing grievous harm with intent to maim** contrary to **section 224 of the Penal Code**.
- 8.2. We therefore exercise our power under **Section 181 of the Criminal Procedure Code** to convict the Appellant on the lesser offence as we now do.
- 8.3. The Appellant is accordingly convicted for the offence of **causing grievous harm with intent to maim** and is sentenced to seven (7) years imprisonment commencing from the date of incarceration.


.....
C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT


.....
M.M. KONDOLO SC
COURT OF APPEAL JUDGE


.....
A.M. BANDA-BOBO
COURT OF APPEAL JUDGE