

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

Appeal No. 87/2021

BETWEEN:

MIRRIAM CHILOSHA

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Makungu, Sichinga and Muzenga, JJA
On 15th February, 2022 and 16th December, 2022.

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

For the Respondent: C. Soko, Deputy Chief State Advocate, National Prosecution Authority

J U D G M E N T

MUZENGA, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Edward Sinyama v. The People (1993 – 1994) ZR 16**
- 2. Saluwema v. The People (1964) ZR 4**
- 3. James Mulenga v. The People – CAZ Appeal No. 139/2018**
- 4. Nembhard v. The Queen (1982) 1 ALL ER 183**
- 5. Ann Njeri Kibichio v. The Republic – Criminal Appeal No. 180 of 2010**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Criminal Code, Revised Statutes of Canada, 1985, Chapter C-46**

Other works referred to:

1. **Pleading, Evidence and Practice, 43rd Edition.**
2. **Black's Law dictionary, Ninth Edition, Brian A. Garner.**

1.0 INTRODUCTION

- 1.1 The appellant was convicted of murder contrary to **section 200 of the Penal Code¹** and arson contrary to **section 328 (1) (a) of The Penal Code as amended by Act No. 17 of 2007.** She was subsequently sentenced to death for the first count and sentenced to life imprisonment for the second count by the High Court (before Mr. Justice E. Pengele).
- 1.2 The particulars of the offence in count one are that the appellant did murder Jeremiah Mbawa on 22nd December, 2019. In the second count, the particulars of the offence are that the appellant wilfully and unlawfully set on fire a house valued at K40,285.00, the property of Floriana Lodge.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

- 2.1 The appellant's conviction was secured by the evidence of nine prosecution witnesses. A summary of the evidence of PW1, Martin Muke, an Assistant Maintenance Officer at Floriana Lodge, was that on 14th December, 2019 around 22:00 hours he met the appellant when she was heading to the worker's compound. The appellant introduced herself as the deceased's girlfriend. PW1 advised her to go back to the deceased's house as the lodge security might apprehend her at that late hour. The appellant asked PW1 if he had airtime so that she could call the deceased and check on him as he was nursing a friend in hospital. PW1 called the deceased who did not answer the call. It was PW1's evidence that he further advised the appellant to go and sleep.
- 2.2 The following morning when PW1 woke up, he felt like there was a whirlwind, he looked around and he noticed smoke coming out of the deceased's house. He quickly rushed to switch off a circuit breaker and when he returned to go and switch off the main circuit breaker he saw the appellant running out of the deceased's house. In his further testimony, he told the trial court that he alerted his fellow workers who

helped him put out the fire. Later on, he visited the deceased at Solwezi General Hospital where he was nursing burn wounds.

2.3 In cross-examination, he stated that the woman he saw running out of the deceased's house wore a pair of black trousers.

2.4 Miriam Mbawa, a young sister to the deceased testified as PW2. A summary of her evidence was to the effect that on 15th December, 2019, she received a phone call from her sister Mary who informed her that the deceased had been burnt by the appellant. She attempted to call the appellant to inquire about what had happened but the appellant's phone was off. She tried calling her again around 16:00 hours and the appellant answered the call. She denied having burnt the deceased and informed her that she was in Kabwe at the time.

2.5 In her further testimony, she told the trial court that around 19:00 hours on the same day, she received a message from an unknown number which read as follows **"Mirriam just tell your brother to tell you the truth that I am not the one that has burnt him, the truth shall set him free."** She called the unknown number and a man answered. He asked the man why he had sent such a text message and the man responded that the message had been sent by

a lady who asked to use his phone and that the said lady was at Solwezi bus station.

- 2.6 PW2 told the trial court that she passed over the information to her sister Mary who was in Solwezi and that after three hours she received information that the appellant had been arrested. She narrated that the appellant is her childhood friend and that they are close friends.
- 2.7 In cross-examination, she stated that the deceased told her that it was the appellant who burnt him.
- 2.8 The third prosecution witness was Mathews Mbawa, a young brother to the deceased who told the trial court that on the fateful day, he received a phone call from his sister Mary to the effect that the deceased had been burnt. He immediately travelled to Solwezi with his sister Mary to check on the deceased. When they arrived, their brother, Luckson, who was already in Solwezi, took them to Solwezi General Hospital where the deceased was admitted.
- 2.9 In his further testimony he stated that at 17:00 hours, Mary received information that the appellant was in Solwezi and around 21:00 hours in the company of Lucky Mbawa and one Peter, a worker at Floriana Lodge, he went to Solwezi Bus Station to look for the appellant. They

found her sleeping on the Likili bus. The trio informed the police who later apprehended the appellant and took her to Solwezi Central Police.

2.10 In cross-examination, PW3 stated that the appellant was the deceased's former girlfriend and that the deceased told him that the appellant burnt him.

2.11 Beuna Mulenga the next-door neighbour to the deceased testified as PW4. Her evidence was that on 15th December, 2019 around 06:00 am she saw the appellant running out of the deceased's house half-naked. She felt embarrassed as there were several men around and she rushed to give her a pink top to wear. She asked the appellant why she was running away and the appellant told her that people in the house wanted to beat her.

2.12 In her continued testimony, PW4 narrated that she never saw the people who wanted to beat the appellant and that she later came to learn that the appellant had burnt the house where the deceased was. The following day, she was called to give a statement to the police and she identified the pair of trousers the appellant wore.

- 2.13 In cross-examination, she stated that she did not bother to pay attention as to whether the appellant was in a panic mood as she was rushing to church.
- 2.14 The fifth prosecution witness was Grace Lutangu, Manager at Floriana. She told the trial court that on 15th December, 2019 she received a call from the lodge receptionist informing her that the deceased's house was on fire and that the deceased had been rushed to the hospital. She directed the receptionist to look for people to put the fire out. When she arrived at the lodge she found smoke still coming out of the house.
- 2.15 She proceeded to the hospital where she found the deceased in the Intensive Care Unit. She told the trial court that the deceased narrated to her that his ex-girlfriend, Mirriam Chilasha, the appellant herein, poured petrol on him as he was coming from the bathroom. That as he turned around to wipe his face, his ex-girlfriend poured more petrol on his body and ignited a match stick and threw it at him. She told the trial court that she questioned the deceased on whether he had petrol in his room and the deceased responded that he did not know

where the accused got it from as he did not keep any petrol in his house.

2.16 In her continued testimony, she narrated that the deceased was completely burnt from head to toe and that the body was black. She explained to the trial court that the deceased was an employee of Floriana Lodge. She stated that the value of the damaged property and the house was to the tune of K40,285.00.

2.17 In cross-examination, she stated that the deceased was burnt while he was awake and that the petrol was in a dish.

2.18 Constable Albert Chiluwa was the sixth prosecution witness. He told the trial court that while on duty on 15th December, 2019, he received a report from Luckson Mbawa that there was a suspect in Likili Motorways Bus Registration Number AIB 8823, parked at Solwezi Main Bus Station who had burnt someone at Floriana Lodge. Acting on the information he detailed the reserve police, Constable Silwemba to accompany Luckson Mbawa. The appellant was later apprehended and taken to the Terminus Police Post and was subsequently taken to Solwezi Central Police for further investigations.

2.19 PW7 told the trial court that on 15th December, 2019 as he was watching movies with his friend, Kalunga Mulowa the driver of the Likili bus, when the appellant approached them and asked if she could sleep on the bus as she did not want to miss the bus. His friend agreed and the appellant proceeded to the back seat. After a short while, the appellant asked the driver if she could use his phone to communicate as she had dropped her purse. The driver told her that his phone was busy and directed her to ask him.

2.20 PW7 stated that he allowed her to use the phone and later in the night when he reached home, he received a phone call from a lady who was inquiring about the whereabouts of the person who had used his phone. He told the trial court that he told the said lady the details of where he had left the appellant. It was his testimony that 10 minutes later, he received another call from a man who told him that the accused had burnt someone. He advised the man to go to Likili bus at the main Bus Terminus.

2.21 The prosecution dispensed with the eighth witness after the defence successfully objected to his evidence that the accused led him to the scene of the crime to conduct a scene reconstruction.

2.22 The last witness was Alex Chilufya, a Detective Inspector based at Solwezi Central Police Station. He told the trial court that on 15th December, 2019 he received a report of attempted murder relating to this case. The report was made by the deceased who complained that his ex-girlfriend, the now appellant, attempted to take his life by pouring petrol and setting him ablaze. He told the trial court that the deceased took a taxi and went to the police station to report the matter. After being issued with a medical report form, he proceeded to the hospital where he was admitted into the Intensive Care Unit. He stated that the deceased sustained burns all over his body and that his house together with property valued at K40,285.00 were burnt to ashes. He told the trial court that the said incident happened around 06:00 am.

2.23 He went on to tell the court that he visited the scene of crime together with scenes of crime officers where he confirmed that the house and the property in it were indeed burnt to ashes. He narrated that he collected some of the remnants of the burnt items for use as exhibits. He also collected a 2-litre juice container from the bathroom of the house which was not very affected by the fire. He told the trial court

that the said container contained suspected petrol which he later took to Indeni Oil Refinery in Ndola for analysis and examination, however, the said analysis and examination were not conducted because the oil refinery indicated that the quantity was too little as the minimum quantity for analysis was 1 litre.

2.24 PW9 went on to testify that he visited the deceased who had been admitted at Solwezi General Hospital's Intensive Care Unit. He informed the trial court that he interviewed the deceased who confirmed that he had been burnt by the appellant. PW9 further stated that the deceased disclosed that the appellant burnt him after he suggested that the two should break up their love relationship and that each one of them should concentrate on their fiancés. He told the trial court that the deceased told him **"Officer I am dying, I am in pain."** That this prompted him to record a dying declaration from the deceased in which the deceased stated that he believed himself to be dying and had no hope of recovering. That the cause of his illness was that his ex-girlfriend, Mirriam Chilosha, poured petrol on him and set him ablaze.

- 2.25 He told the trial court that on 22nd December, 2019 the deceased passed away and a post-mortem examination revealed that the cause of death was severe first-degree burns at 70 per cent. He told the trial court that he went on to interview several witnesses including the appellant. The appellant informed him that she was pregnant and that the deceased was forcing her to take abortion drugs. He stated that he issued a medical report to the accused person and she was accompanied to Solwezi Central Hospital to take a pregnancy test and the test came out negative.
- 2.26 He testified that armed with this information, he decided to charge the appellant with the offences of murder and arson. In his further testimony, he stated that his investigations revealed that when the appellant and the deceased were in a relationship, they each had their own fiancés and that they would meet secretly in Kitwe at a house rented by the appellant. That when the deceased informed the appellant that they were breaking up, the appellant got annoyed and reacted violently against the deceased and ended up burning him.
- 2.27 PW9 testified that he made an effort to establish the source of the petrol by approaching the nearest filling station and was unable to

obtain the CCTV footage as it had been deleted. He went on to produce the appellant's medical report, the post-mortem examination report, a letter from Indeni Petroleum Refinery Company Limited, a dying declaration, remains of the burnt items and the 2-litre juice container with suspected petrol.

2.28 Under cross-examination, PW9 accepted that the dying declaration was only made to him in the presence of the ICU nurse and that the deceased signed the said document. He stated that only one person was allowed to enter the ICU at a time.

2.29 This marked the end of the prosecution case.

3.0 THE DEFENCE

3.1 In her defence, the appellant denied having set the deceased ablaze. She stated that the deceased was a huge man who could not have just stood and allowed her to pour petrol on him. The appellant told the trial court that her love relationship with the deceased started in 2013 and came to an end in 2018 as their families were not in approval of the same. That despite the break up, they continued to meet secretly until when she informed the deceased that she was pregnant.

- 3.2 According to the appellant, this information angered the deceased who requested her to terminate the pregnancy. The appellant narrated to the court how she refused to abort the pregnancy and how the deceased threatened to take his own life if she did not abort. She told the trial court that the deceased's death threats intensified and she decided to travel to Solwezi to see him on 22nd November, 2019. She stated that when she arrived at his house, she found him sleeping and she noticed some pills in the house. She asked the deceased why there were pills in the house and he told her that he wanted to kill himself because she was not following his instruction to abort. The following day, she travelled back to Kabwe for work.
- 3.3 She went on to narrate that on 28th November, 2019 she went back to visit the deceased and all was well until the deceased started forcing her to take pills to abort the pregnancy. She narrated that on the 14th of December, 2019, the deceased left his house very early in the morning and returned after mid night. She stated that at around 21:00 hours she went outside to look for the deceased and met his workmate called Bosha. She told the trial court that Bosha called the deceased but his phone went unanswered.

- 3.4 In her continued testimony, she stated that when the deceased returned home around 02:00 am, he shouted at her for having used Bosha's phone to call him. When she woke up she asked him if she could go to Ndola and he told her that he would let her go after she drinks the medicine. She refused to take the pill and the deceased left the bedroom. After a short while, he came back into the room looking wet with water and matches in his hands. He handed over the water to her to use to drink the pills and told her that if she would not take the pills she would not like what he would do. She narrated that she still refused to take the pills and the deceased tried to light up the match stick prompting her to go to him and try to bump it off from his hand. That she was surprised, the match stick fell on the deceased and he got burnt.
- 3.5 She testified that she poured water on the deceased to put out the fire and after the fire was put out, the deceased charged toward her and she run out of the house where she met a couple who were going to church. She told the trial court that since she was not fully dressed the woman went into the house and got a top for her.

- 3.6 It was her testimony that she then went to look for a taxi which she intended to use to take the deceased to the hospital. She then heard people shouting that the house was on fire. One of the men who were erecting a billboard and who had seen her coming out of the house naked went to her and told her that she would be caught because he had seen her coming out of the house. She stated that the said man told her to run before people saw her and that is how she left the premises. She told the trial court that her aim was to take the deceased to the hospital.
- 3.7 She narrated that she later went to the bus station, where she asked to use a phone for someone. She sent a text message to the deceased's sister and slept. That around 21:00 hours she was captured by the police who were in the company of the deceased's young brother.
- 3.8 Under cross-examination, she conceded that as a trained teacher, she is aware of the steps to take when one suspects being pregnant and that she did not take the said steps. She confirmed that when the police took her for a pregnancy test it came out negative. She denied

having been burnt in the inferno and accepted that she is aware that the deceased died as a result of the burns he suffered.

- 3.9 In re-examination, she stated that it was after the deceased had lit the match that she pushed the match without knowing that it would burn him or that he had inflammable substances on his body.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

- 4.1 The trial court found that the appellant's version that the deceased burnt himself in a bid to take his own life after she consistently refused to abort the suspected pregnancy was not reasonably possible. The trial court also found that given the nature of the severe burns that were sustained by the deceased, the dying declaration made by the deceased was made at the time he had lost hope of surviving the severe burns he had suffered and could not have falsely implicated the appellant as the person who had burnt him.
- 4.2 The trial court further held that there was overwhelming evidence that the appellant intentionally, deliberately and illegally burnt the deceased, causing him to suffer severe burns that led to his death. With respect to the offence of arson, the trial court found that the deceased's house was burnt by the same fire which the appellant used

to burn the deceased. The court concluded that the appellant wilfully and unlawfully set fire to the house in question. The trial court found the appellant guilty on both counts, convicted and sentenced her to death on the first count of murder and life imprisonment on the second count of arson.

5.0 GROUNDS OF APPEAL

5.1 Disenchanted with the conviction and sentence imposed on her, the appellant filed two grounds of appeal as follows:

- 1) The lower court erred in law and in fact when it convicted the appellant in the face of weak circumstantial evidence and a dying declaration.**
- 2) The lower court erred in law and in fact when it rejected the appellant's version of events which was not only probable but possible.**

6.0 APPELLANT'S ARGUMENTS

6.1 Learned counsel for the appellant filed heads of arguments in support of the appeal. In support of ground one of the appeal, it was submitted that the dying declaration referred by the state is not sound at law as there is a possibility of concoction and distortion as the deceased and the appellant were said to have had a difference and the statement was made 7 days to the deceased's death. We were referred to the

case of **Edward Sinyama v. The People**¹ where it was held *inter-alia*:

"A statement is not ineligible as part of the *res gestae* if a question has been asked and the victim has replied or if the victim has run for half a kilometre to make the report. If the statement has otherwise been made in conditions of approximate though not exact contemporaneity by a person so intensely involved and so in the throes of the event that there is no opportunity for concoction or distortion to the disadvantage of the defendant or the advantage of the maker, then the true test and the primary concern of the Court must be whether the possibility of concoction or distortion should be disregarded in the particular case."

- 6.2 It was submitted that the said dying declaration made seven days prior to the deceased's death was made in circumstances that gave an advantage to the maker and a disadvantage to the appellant as there was bad blood between the parties at the time and there was room for concoction of the sequences of events by the maker of the statement.
- 6.3 According to counsel, the trial court rightly directed its mind when it observed and held that the prosecution case rested on circumstantial evidence as no one saw the fire starting nor the deceased getting burnt but they saw the appellant running away from the house. However, the trial court misdirected itself when it held that only a single inference can be drawn from the set of facts before it when multiple inferences

could be drawn other than an inference of guilt. We were urged to acquit the appellant and set her at liberty as the prosecution failed to prove its case beyond all reasonable doubt.

- 6.4 In support of ground two, it was submitted that it is trite law that the prosecution bears the burden of proof to prove the guilt of an accused person beyond all reasonable doubt. An accused person bears no obligation to prove his or her innocence. It was contended that the appellant explained in her defence that she differed with the deceased over the deceased's desire for her to abort her pregnancy which she rejected and he committed suicide on account of his other relationship with another lady. This explanation was not only probable but possible in a sexual relationship. We were referred to the case of **Saluwema v. The People**² where it was held that **"If the accused's case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof."**

- 6.5 It was submitted that the lower court's analysis of the appellant's defence from pages 38 to 43 of the judgment shows that the trial court did not give the appellant a benefit of doubt but dismissed her defence

as if it needed to be proven beyond all reasonable doubt. We were urged to set aside the findings of the court below concerning the appellant's defence and set the appellant at liberty.

7.0 RESPONDENT'S ARGUMENT

7.1 In response, the respondent argued grounds one and two together and contended that the trial court was on firm ground when it held that the appellant's explanation that the deceased committed suicide was not reasonably possible and was a mere afterthought. According to counsel, the reasons for the alleged suicide were demolished by the prosecution's medical report. It was submitted that it is evident from the facts on the record that the deceased and the appellant were lovers and the actions of the appellant after the alleged suicide are uncharacteristic of those reasonably expected of one who is in such a relationship. It was counsel's submission that the appellant's conduct of changing clothes after the alleged suicide by the deceased points to her distancing herself from the offence.

7.2 It was learned counsel's further contention that the only reasonable inference to be drawn from the circumstances of this case is that the appellant is the one who burnt the deceased. It was submitted that

the other inferences suggested by the appellant's counsel are speculative and contradict the appellant's narration of events. That it cannot be assumed that the deceased implicated the appellant due to malice. There is no evidence to suggest that the deceased was in any way motivated by malice nor does it show he had an interest of his own to serve.

- 7.3 It was contended that the court below was on firm ground when it admitted into evidence the deceased's statement as a dying declaration. It was submitted that the main consideration is whether the maker of a dying declaration had a settled hopeless expectation of death. In summation, we were urged to uphold the conviction and sentence.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

- 8.1 At the hearing of the appeal, learned counsel for the appellant and learned counsel for the respondent both placed full reliance on their respective arguments. We are grateful for their submissions.

9.0 CONSIDERATION AND DECISION OF THE COURT

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

- 9.2 The issue in ground one is whether the statement recorded from the deceased before he died amounted to a dying declaration, an exception to the rule against hearsay. The issue in the second ground is whether the trial court was right to reject the appellant's explanation.
- 9.3 Whether a statement given by a deceased person qualifies as a dying declaration depends on the facts of each case. In the case of **James Mulenga v. The People**³, we dealt with the issue of a dying declaration. We stated as follows:

"Notwithstanding, we agree with Ms. Mumba's submission that a statement by a deceased person, on the circumstances leading to her death, though not contemporaneous to the act causing death, can be admissible as a dying declaration. According to Eyre C.B. in the case of R v Woodcock, cited with approval in R v Perry, at 701, dying declarations are admissible because:

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity when the party is at a point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

Further, the editors of Archbold: Pleading, Evidence and Practice, 43rd Edition, paragraph 11-17, have pointed out that dying declarations are admissible where the judge is satisfied that the deceased was conscious of

being in a dying state at the time they were made and she was aware of her awful situation."

- 9.4 The learned trial court after considering the statement given by the deceased and reviewing the authorities on the subject had the following to say:

"It is evident that even a verbal dying declaration can suffice if it meets the requirements of the law. In the present case, the dying declaration of the deceased is said to have been written down by PW9; read back to the deceased: admitted by the deceased to have been correctly recorded; and signed by the deceased. Having considered the nature of the severe burns that were sustained by the deceased, I am satisfied that, at the time when the dying declaration was made by the deceased, the deceased had lost hope of surviving the severe burns he had suffered. I am convinced that the deceased must have had a settled hopeless expectation of death. Incontestably, the deceased died a few days later, on the 22nd December, 2019.

I am satisfied beyond reasonable doubt that the deceased could not have falsely implicated the accused as the person who had burnt him. I do not think that the deceased could have lied when he had already lost any hope of living and was certain that he would die sooner than later."

- 9.5 We cannot fault the decision of the trial court in accepting the deceased's statement as being a dying declaration. What is cardinal is not whether the statement was made shortly after the incident or shortly before dying. But the statement should be made at the time

when the deceased has lost all hope of living. This can expressly be given or discerned from the words uttered by the deceased in the state of anguish.

- 9.6 In the case of **Nembhard v. The Queen**⁴, a case also referred to by the learned trial court, the prosecution evidence was anchored on what the deceased told his wife a few hours before he died. The deceased had been shot at the gate of his home and there were no eye witnesses, but when his wife heard the shots, she ran out to him from the house. He told her that he was going to die, that she was going to lose her husband and that the appellant had shot him. The trial judge admitted the evidence of the wife as to her husband's statement, on the basis that it was a dying declaration. There was no other evidence which implicated the appellant. On appeal, the Privy Council, when dismissing the appeal, stated as follows:

"It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he

was face to face with his own impending death. There is the further consideration that it is important in the interests of justice that a person implicated in a killing should be obliged to meet in court the dying accusation of the victim, always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment by the jury."

- 9.7 In our case, the appellant stated clearly that he believed he was dying and had no hope of recovery and he died a few days later. At that time, he was admitted in intensive care for severe burns. By his own express words and the extent of the burns sustained, it cannot be doubted that he had a settled and hopeless expectation of death. The understanding, therefore, is that when a person is certain of his demise, it becomes improbable that they would tell untruths. This is because there exists no motive to do so nor any benefit derived therefrom, as there exists no hope of living again. Further, no one would want to meet the creator with an untruthful mouth and mind. It is believed that doing so would guarantee eternal misery.
- 9.8 We therefore agree with the argument by the state and the acceptance of the statement by the trial court as an exception to the hearsay rule. As a consequence, we find no merit in ground one.

9.9 In ground two, it has been argued that the trial court erred when it rejected the appellant's version of events. The appellant's account was that the deceased torched himself after the appellant refused to take an abortion pill. The trial court considered this explanation and disbelieved it. We find no reason to interfere with learned trial court's finding on this score. The appellant was seen running, from the house in which the deceased was, half naked. When asked she stated that some people in the house wanted to beat her. Shortly smoke was seen emerging from the same house. She never told anyone at the housing complex of the account she alleged happened. She took off to the bus station, sent a deceptive message to the sister to the deceased before she took a nap on the bus with the intention of leaving Solwezi early morning.

9.10 The trial court considered all this strange behaviour which clearly was not in conformity with her story and rejected it. As we have already said, we have no reason to interfere with the trial court's findings in this regard. We agree that the conduct of the appellant was not consistent with an innocent person. We therefore find no merit in ground two and accordingly dismiss it.

9.11 We have no doubt that the offence for murder was clearly established to the required standard. The conviction for murder is thus safe.

9.12 In the second count, the appellant stood charged and convicted of the offence of arson. In order for a person to be convicted of arson, the prosecution must prove that a person wilfully and unlawfully set fire to the house in question. Therefore, whether or not the appellant is guilty of this offence is dependent on whether she had the requisite mental element. We must state at the onset that it is easy to discern the *mens rea* in a situation where a person deliberately or intentionally torches property or premises.

9.13 The offence of arson is provided under **Section 328 of The Penal Code**. It reads as follows:

"328. (1) Any person who wilfully and unlawfully sets fire to –

- (a) Any building or structure whatever, whether completed or not; or**
- (b) Any vessel or any motor vehicle as defined in the Roads and Road Traffic Act, whether completed or not; or**
- (c) Any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or**
- (d) A mine, or the workings, fittings, or appliances of a mine;**

is guilty of a felony and is liable, on conviction, to imprisonment for a term of not less than ten years and may be liable to imprisonment for life:

Provided that where the arson causes the death of any person the offender shall, on conviction, be liable to imprisonment for life."

9.14 The learned trial court after looking at the foregoing Section, proceeded to consider the offence of arson and stated as follows:

"As I have already held elsewhere in this judgment, the prosecution has already proved beyond all reasonable doubt that it was the accused person who illegally burnt the deceased. On the evidence before me it is clear, and I have no doubt, that the deceased's house was burnt by the same fire which the accused had used to burn him. Accordingly, I hold that the prosecution has proved beyond reasonable doubt that it was the accused person who wilfully and unlawfully set fire to the house in question."

9.15 The trial court did not consider how the torching of the house was wilful in the light of the facts it accepted. There is no doubt that the torching of the house was unlawful because she was not the owner of the house, neither was she allowed to do so. She equally had no lawful justification or excuse. The issue therefore is whether she did so wilfully.

9.16 According to **Black's Law Dictionary Nineth Edition by Bryan A. Garner at page 1737**, the following is said about the word wilful:

"The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is bad or evil intent."

9.17 The Kenyan High Court in the case **Ann Njeri Kibichio v. The Republic⁵**, handling an appeal against a conviction for arson, which offence is worded exactly as ours, had this to say:

"The issue here is whether the appellant intentionally and deliberately set the house on fire. To prove so, the prosecution needs to show that the appellant went about the act of burning the house and things in it by intentionally assembling items or instruments that would cause a fire, and lit that fire and then left the premises."

9.18 The offence of arson as provided in our **Penal Code** requires intent to set fire to the property and does not cover, unintentional or accidental burning nor does it cover fires recklessly or negligently caused. In other jurisdictions, the legislature has included recklessly or negligently causing fire and has even covered fires caused for fraudulent purposes in the penal laws. One of such jurisdictions is Canada whose **Section 434** of the **Criminal Code, Revised Statutes of Canada, 1985, Chapter C-46** provides:

"Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

9.19 In our jurisdiction, the legislature has opted to incriminate situations where one intentionally sets fire and has not legislated reckless or negligent acts which cause fire. The role of the court is to give effect to the intention of the legislator, which is expressed in the clear words of the statute. The most fundamental canon of interpretation is to give the words their ordinary and natural meaning. This is referred to as the literal rule of interpretation. The wording of **Section 328 of The Penal Code** is very clear and unambiguous.

9.20 The facts accepted by the trial court, upon which the conviction is anchored, are that the appellant poured a substance on the deceased, which the appellant referred to as petrol and torched him up. The fire subsequently extended to the house which got burnt. There is clearly no doubt that the appellant was reckless or negligent as to the possibility of the fire spreading to the house when torching the deceased up. Unfortunately this is not covered by **Section 328 of The Penal Code**, as discussed above.


9.21 Had the trial court properly analysed the facts in the light of the law in question, it would certainly not have arrived at the conviction in count two. We therefore quash the conviction for arson and acquit the appellant of this count.

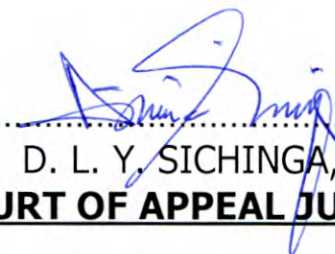
9.22 We also wish to comment on the sentence imposed in respect of arson. The trial court imposed a life sentence. A sentence of life can only be imposed as a mandatory sentence where the arson causes death of a person. This is in a situation where a building or property is set on fire and as a result of that fire to the building or property a life is lost. In this case, it is not the fire to the house which caused the death of the deceased. Therefore, the life sentence was unwarranted.

9.23 We have taken time to analyse the provisions of **Section 328** of **The Penal Code** and the circumstances in which a mandatory sentence of life may be imposed because this is the first time an appellate court in our jurisdiction has had occasion to interpret this Section. This is in order to provide guidance to trial courts and provide clarity in the law.

10.0 CONCLUSION

10.1 Having dismissed both grounds of appeal, the conviction and sentence on count one is upheld. The conviction and sentence in count two are set aside and the appellant is acquitted on this count.


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C. K. MAKUNGU
COURT OF APPEAL JUDGE


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D. L. Y. SICHINGA, SC
COURT OF APPEAL JUDGE


.....
K. MUZENGA
COURT OF APPEAL JUDGE