

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

Appeal No.85/2022

BETWEEN

TERRIES KANGWA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Majula and Muzenga JJA

ON: 17th January 2023, 18th January 2023 and
15th November 2023

For the Appellant: C. Siatwinda, Senior Legal Aid counsel,
Legal Aid Board

For the Respondent: B. Mwewa, Senior Legal Aid Counsel, National
Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Mushemi Mushemi v. The People [1982] Z.R. 71
2. Elias Kunda v. The People [1980] Z.R. 100
3. Chabala v. The People [1976] Z.R. 14
4. Soondo v. The People [1981] Z.R. 302
5. Saluwema v. The People [1965] Z.R. 4
6. Elias Kunda v. The People [1980] Z.R. 100
7. Andrew Tembo v. The People, SCZ Appeal No. 13 of
2011

8. Kenmuir v. Hattingh [1974] Z.R. 162

9. Kachingwe Daka v. The People, CAZ Appeal No 158 of 2021

Legislation referred to:

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

INTRODUCTION

[1] The appellant appeared before the High Court (Limbani, J.), charged with the offence of murder contrary to **Section 200 of the Penal Code.**

[2] He denied the charge and the matter proceeded to trial.

[3] At the end of the trial, he was found guilty as charged and condemned to suffer capital punishment.

[4] He has appealed against the conviction.

CASE BEFORE THE TRIAL COURT

[5] On the 22nd of October 2019, in the morning, Mercy Chali was at home in Mukungule Village in Mpika. She was with her father, Shadreck Kasoma Chali.

[6] Around 06:00 hours, they were visited by one Damson Mubanga, who informed Shadreck Kasoma Chali that he was going to die on that day or within a month, because he was a wizard.

[7] Later that day, Damson Mubanga returned with the appellant and they started assaulting Shadreck Kasoma Chali with a stick. They also kicked him.

[8] Damson Mubanga placed a piece of wire around Shadreck Kasoma Chali's neck and urged him to go into the bush and hang himself. When he did not, Damson Mubanga and the appellant, pushed him into the bush.

[9] That was the last time Shadreck Kasoma Chali was seen alive.

[10] Two days later, Shadreck Kasoma Chali was found hanging from a tree. The area around the body showed struggle marks. The body was immediately brought down and buried because it was decomposed.

[11] A post-mortem examination conducted a year later, found the cause of death to be "homicidal violence". The pathologist indicated that he had come to that conclusion after considering the circumstances of the death as informed by investigators.

[12] In his defence, the appellant did not deny visiting Mukungule village on the material day. However, he denied participating in the assault of Shadreck Kasoma Chali.

[13] He said he left just after Damson Mubanga struck Shadreck Kasoma Chali with a stick. He actually reprimanded Damson Mubanga for that conduct.

[14] The appellant called his son who supported his testimony.

FINDINGS OF THE TRIAL JUDGE

[15] The trial Judge accepted Mercy Chali's version of what happened. He described her as a consistent, credible witness without bias.

[16] He preferred her account of what happened on the material day, to that of the appellant which he characterised as not being credible because it had material contradictions with that of his son, who he called as his witness.

[17] He concluded that even though there was no direct evidence, Shadreck Kasoma Chali died at the hands of the appellant and Damson Mubanga, because he was last seen alive as they assaulted and dragged him into the bush.

GROUND OF APPEAL

[18] The sole ground of appeal is that the trial Judge erred in both law and fact, when he convicted the appellant on evidence that did not prove his guilt.

SUBMISSIONS IN SUPPORT OF THE APPEAL

[19] Mr. Siatwinda referred to the cases of **Mushemi v The People**¹ and **Elias Kunda v The People**² and submitted that the appellant's conviction was not safe because the trial Judge relied on the evidence of a witness who was not credible.

[20] Mr. Siatwinda pointed out that Mercy Chali made it appear like the appellant and Damson Mubanga hit her father with a stick and placed the piece of wire on him together.

[21] It is only in cross examination that she admitted that it was Danson Mubanga alone, who hit her father with a stick and placed a piece of wire on his neck.

[22] In addition, Mr. Siatwinda pointed out that Mercy Chali claimed that when her father's body was found, it was bleeding from the head. However, two other

witnesses said it was decomposed and that is why it was buried *in situ*.

[23] Finally, Mr. Siatwinda pointed out that Mercy Chali concealed the fact that the appellant's son was present when Damson Mubanga was assaulting her father.

[24] Mr. Siatwinda then submitted that for the reasons outlined above, Mercy Chali's evidence was not credible. The trial Judge should not have convicted the appellant on her testimony, in the absence of corroborative evidence.

[25] Mr. Siatwinda also submitted that the trial Judge should have accepted the appellant's account that he did not participate in the beating and dragging of Shadreck Kasoma Chali into the bush, as his explanation could reasonably have been true. It was in fact supported by his son. He referred to the cases of **Saluwema v The People**⁵ and **Elias Kunda v The People**⁶, in support of the proposition.

[26] He also pointed out that the appellant was a credible witness because he remained consistent. The version of events he gave in his testimony is exactly the same as what he told the police at the earliest opportunity.

SUBMISSIONS AGAINST THE APPEAL

[27] In response Mr. Mwewa submitted that Mercy Chali's evidence was credible because it was not discredited in cross examination. He argued that there was no evidence from cross examination that suggested that witness had a possible interest of her own to serve.

[28] Mr. Mwewa argued that even if no one saw the appellant hang the deceased, it is unlikely that he would have hanged himself.

[29] Mr. Mwewa then submitted that it was possible to infer from the circumstances of the case, that the assault was the cause of death. He referred to the case of **Andrew Tembo v The People**⁷ in support of the proposition.

COURT'S CONSIDERATION OF THE APPEAL AND DECISION

[30] The determination of the circumstances leading to the loss of the life of Shadreck Kasoma Chali, entirely lay on the resolution of the conflicting version of events between that of his daughter and that given by the appellant and his son.

[31] But before we scrutinize how the trial Judge resolved the issue, we will deal with the four issues Mr.

Siatwinda argued established that Mercy Chali was not a credible witness.

[32] The first two issues raised by Mr. Siatwinda were that in examination in chief, Mercy Chali made it appear that both the appellant and Damson Mubanga, hit her father with a stick and placed a wire around his neck.

[33] Our examination of the record shows the contrary.

[34] At page 9 of the record of appeal, while under examination in chief, Mercy Chali mentioned that the stick her father was hit with was picked by Damson Mubanga. She did not say they both used it.

[35] Similarly, at page 10 of the record of appeal, while still being examined in chief, she testified that Damson Mubanga placed a piece of wire around her father's neck.

[36] This being the case, we find Mr. Siatwinda's claim that Mercy Chali only clarified the hitting with a stick and the placing of the wire, in cross-examination, is not supported by the evidence on record.

[37] Coming to the state of her father's body when it was discovered, at page 12 of the record of appeal, Mercy Chali mentioned that in addition to seeing her father's body bleeding, the body was "swollen" and he was buried "just there in the bush because the body was in a bad state, we couldn't manage to carry it."

[38] This evidence equally contradicts Mr. Siatwinda's claim that Mercy Chali's evidence on the state of her father's body was not credible. She actually told the trial Judge that her father's body was decomposed.

[39] The fourth issue raised by Mr. Siatwinda was that of Mercy Chali concealing the presence of the appellant's son during the incident.

[40] In both her examination in chief and cross-examination, Mercy Chali was not asked about the presence of the appellant's son during the incident.

[41] She was only asked about what she did when her father was being assaulted. She said she started crying and that it attracted onlookers. She also said she could not remember who came, other than one Mwansa.

[42] It is our view that the credibility of Mercy Chali cannot be impugned for the reasons advanced by Mr.

Siatwinda, as he clearly misapprehended the testimony of that witness.

[43] Reverting to the question whether the trial Judge can be faulted for rejecting appellant's version of what happened, as we stated earlier on, this case was resolved primarily on credibility.

[44] In the case of **Kenmuir v. Hattingh⁸**, the Supreme Court held, *inter alia*, that:

"Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error"

[45] In his defence, the appellant admitted visiting Shadreck Kasoma Chali's house in the company of Damson Mubanga. He said he left when Damson Mubanga started assaulting Shadreck Kasoma Chali. This claim was supported by his son.

[46] On the other hand, Mercy Chali's evidence was that the appellant was actually involved in the kicking of her father and his being pushed into the bush to hang himself.

[47] We have not found any reasons on which the trial Judge can be questioned for accepting Mercy Chali's

testimony in preference of that of the appellant and his son.

[48] This being the case, we are satisfied that the trial Judge was entitled to conclude that she was a credible and consistent witness. We therefore find that her evidence does not require other evidence to corroborate it, as suggested by Mr. Siatwinda.

[49] Since the trial Judge found that the appellant and his son's evidence was not credible, inferences cannot be drawn on the very evidence that was rejected.

[50] We note that there was no 'definite' evidence of the cause of Shadreck Kasoma Chali's death because the pathologist simply found that death was as a result of "homicidal violence".

[51] Even if that was the case, in the case of **Kachingwe Daka v. The People**⁹, we held that the fact that a person was murdered can be proved by circumstantial evidence in the absence of direct evidence on the cause of death.

[52] In this case, Shadreck Kasoma Chali was initially accused of being a wizard by Damson Mubanga. He was also told that he was going to die that day. The

appellant and Damson Mubanga then assaulted him and 'encouraged' to go into the bush to hang himself.

[53] When Shadreck Kasoma Chali declined to go into the bush, the appellant and Damson Mubanga pushed and dragged him, into the bush.

[54] Two days later, Shadreck Kasoma Chali was found hanging from a tree. There were struggle marks around the area where his body was hanging and there was also blood oozing from his head.

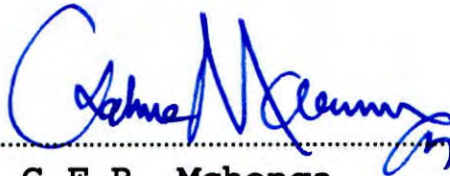
[55] On this evidence, even though a post-mortem was conducted and there was no definite medical evidence of the cause of Shadreck Kasoma Chali's death, we are satisfied that the trial Judge was entitled to conclude that he was murdered by the appellant and Damson Mubanga.

[56] Shadreck Kasoma Chali could not have died from natural causes or self-inflicted injuries, he was deliberately killed. Further, no other persons could have done so, other than the appellant and Damson Mubanga.

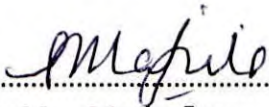
VERDICT

[57] We find no merit in the appeal against conviction and we dismiss it. Consequently, we uphold the conviction.

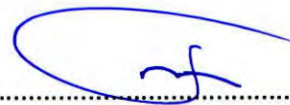
[58] We also uphold the sentence imposed by the trial Judge.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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B.M. Majula
COURT OF APPEAL JUDGE



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K. Muzenga
COURT OF APPEAL JUDGE