

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

Appeal No 88/2022

**BETWEEN:**

**JUSTINE MUSUKWA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: Mchenga DJP, Majula and Muzenga JJA**

**ON: 17<sup>th</sup> January 2022 and 15<sup>th</sup> November 2023**

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

**For the Respondent: A. Kennedy- Mwanza, Senior State Advocate, National Prosecution Authority**

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## **J U D G M E N T**

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**Mchenga DJP, delivered the judgment of the court.**

**Cases referred to:**

1. Mbinga Nyambe v. The People [2011] Z.R. 246
2. Nkhata and Others v. Attorney General [1966] Z.R. 124
3. Kanyanga v. The People, SCZ Appeal No. 145 of 2011
4. Edward Sinyama v. The People [1993-1994] Z.R. 16

**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.), on a charge 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 JUDGE**

[5] On the 3<sup>rd</sup> of February 2021, around 19:00 hours, Gift Munyenyembe and his sister Florence Munyenyembe, left the market place in their village in Muyombe, heading home.

[6] On their way, they met the appellant who was Florence Munyenyembe's estranged husband. Florence Munyenyembe had in the last few days left home following a marital dispute.

[7] The appellant greeted both of them and held on to his wife after a handshake.

[8] Even though the conversation that followed between the appellant and his wife, appeared like an argument,

Gift Munyenyembe walked away believing that the appellant wanted to talk to his wife.

[9] Just before reaching his house, which was nearby, Gift Munyenyembe heard his sister cry out for help. He ran back to where he had left her with the appellant.

[10] As he got there, the appellant fled. He noticed that his sister had a wound on the stomach and she told him that the appellant had stabbed her with a knife.

[11] The appellant's wife was taken to the hospital where she died 2 days later.

[12] When a post-mortem was conducted on her body, the cause of her death was found to be a stabbing that had perforated the bowel.

[13] The appellant was never to be seen again until his apprehension in Malawi on the 8<sup>th</sup> of April 2021.

[14] The appellant's unsworn statement in court, was that that evening, his wife tripped and fell on a wire mesh that she had been using to roast maize at the market. Following the fall, he helped her up and escorted her home.

FINDINGS BY THE TRIAL COURT

[15] The trial Judge opined that the case against the appellant was grounded on circumstantial evidence.

[16] He found that appellant's explanation of how his wife got injured, could not reasonably have been true. He also treated the appellant's flight, soon after the incident, as incriminating.

[17] The trial Judge concluded that on the evidence before him, the prosecution had proved beyond all reasonable doubt that the appellant murdered his wife.

[18] The appellant was condemned to suffer capital punishment after the trial Judge found that there were no extenuating circumstances.

THE SOLE GROUND OF APPEAL AND ARGUMENTS IN SUPPORT

[19] The sole ground of appeal is that an inference of guilty is not the only inference that could have been drawn on the evidence that was against the appellant.

[20] In support of the sole ground of appeal, Mr. Makinka referred to the case of **Mbinga Nyambe v The People**<sup>1</sup> and submitted that the appellant's story was reasonably possible.

[21] He then submitted that since Gift Munyenyembe did not see the appellant stab his wife, the appellant's explanation should not have been dismissed as one that could not reasonably have been true.

[22] Mr. Makinka also argued that Florence Munyenyembe's statement that the appellant stabbed her, should not have been received as either *res gestae* or a dying declaration, because the police did not interview her concerning the circumstances of the stabbing.

#### **ARGUMENTS IN RESPONSE TO THE APPEAL**

[23] In response, Mrs. Kennedy-Mwanza submitted that the trial Judge cannot be faulted for finding that the appellant's explanation that his wife suffered the fatal injury after she fell on the wire mesh, could not reasonably have been true.

[24] She also submitted that the trial Judge was entitled discredit the appellant's story on the basis that his flight into Malawi, was not, in the circumstances of this case, the conduct of an innocent person.

**COURT'S CONSIDERATION OF THE APPEAL AND DECISION**

[25] It was common cause that Florence Munyenyembe suffered the injuries that led to her death while in the company of the appellant. The environment immediately preceding Florence Munyenyembe's suffering the fatal injuries, was far from cordial.

[26] She had earlier left the matrimonial home following misunderstandings with the appellant. Further, on the day she suffered the fatal injury she appeared to have been arguing with the appellant.

[27] Mr. Makinka argued that Florence Munyenyembe's statement incriminating the appellant should not have been received because she was not interviewed by the police.

[28] We are not aware of any principle of law to the effect that a statement made by a deceased person, can only be received as either *res gestae* or as a dying declaration, where the maker was interviewed by the police.

[29] As the law stands, such statements are admissible as long as the person tendering the statement satisfies the court, in the case of *res gestae*, that they were

made contemporaneous to the infliction of the injury that caused death, and in the case of a dying declaration, that the deceased had lost expectation of living.

[30] In the case of **Edward Sinyama v. The People**<sup>4</sup> it was held that:

"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"

[31] In this case, soon after Florence Munyenyembe cried out for help, her brother rushed to where he had left her. She immediately told him that the appellant had stabbed her.

[32] Going by the decision in **Edward Sinyama v. The People**<sup>4</sup>, Florence Munyenyembe's incriminating statement was rightly admitted into evidence because although not made in exact contemporaneity, it was made

in approximate contemporaneity to the stabbing ruling out the danger of concoction.

[33] Further, the appellant's claim that his wife fell on a wire mesh she was carrying after tripping, is not supported by the medical evidence that established that she suffered a stab wound.

[34] Having in mind that the appellant fled following his wife's distress call, it is our view that the trial Judge was entitled to come to the conclusion that the only inference that could be drawn on the evidence before him was that the appellant stabbed his wife.

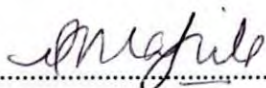
### VERDICT

[35] We find no merits in the sole ground of appeal and we dismiss it.

[36] We also uphold the conviction and the sentence imposed on the appellant.



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C.F.R. Mchenga  
DEPUTY JUDGE PRESIDENT



.....  
B.M. Majula  
COURT OF APPEAL JUDGE



.....  
K. Muzenga  
COURT OF APPEAL JUDGE