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

Appeal No. 002/2022

BETWEEN:

SANGALA KABIKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sichinga and Muzenga, JJA
On 23rd August 2022 and 29th December 2023

For the Appellant: Mrs. M. K. Liswaniso, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C. K. Sakala – State Advocate, National Prosecution Authority

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JUDGMENT

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Dorothy Mutale and Richard Phiri v. The People (1997) SJ 51**
2. **Saluwema v. The People (1965) ZR 4 (C.A.)**
3. **Justin Mumbe v. The People (2004) ZR 106 (SC)**
4. **Shawaz Fawaz and Another v. The People (1995 – 1997) ZR 36**
5. **Donald Fumbelo v. The People – SCZ Judgment No. 476 of 2013**
6. **David Zulu v. The People (1977) ZR 151**

7. **Saidi Phiri v. The People – Selected Judgment No. 30 of 2015**
8. **Elias Kunda v. The People (1980) ZR 100**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellant was sentenced to death by Mulife, J, as he then was, following a conviction for murder in the High Court.

1.2 The particulars of offence alleged that on 10th April 2019 at Mongu, in the Western Province of the Republic of Zambia, the appellant murdered Pelekelo Sangala.

2.0 PROSECUTION EVIDENCE BEFORE THE TRIAL COURT

2.1 A summary of the prosecution evidence was that on 9th April 2019, the appellant got his daughter from his girlfriend PW1 and went with her to his village. Upon realising that the appellant's mother had travelled to Kaoma and that there was no one staying with the appellant who could take care of her two-year-old daughter, PW1 informed the appellant about her concerns. This was three days after the appellant got his daughter.

2.2 The appellant appeared displeased with PW1's concerns and responded that he was the father to the child and he would take care of her. Unsatisfied with the appellant's answer and knowing well that the appellant was a keen drinker of beer, PW1 approached the police and lodged a complaint. The appellant was subsequently apprehended and interrogated by the police about the whereabouts of the child. He later led them to a place where he had buried his daughter.

2.3 The body was exhumed and identified by PW1, the mother of the child. Later on, a decision was made by the police to bury the body again as they waited for the pathologist to arrive. When the pathologist arrived the body was exhumed and a postmortem examination was conducted without the identification of the body.

2.4 This marked the end of the prosecution case. The appellant was found with a case to answer and he was put on his defence.

3.0 DEFENCE

3.1 In his defence, the appellant opted to give sworn evidence and called no witnesses. He explained that on the material day, he left the baby at home and went drinking. When he returned, he found the baby had died. He narrated further that he panicked and knowing well how PW1

was going to behave if she found out that their child had died, he decided to bury her.

3.2 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After careful consideration of the evidence before him, the learned trial judge found that the pathologist found the cause of death to be brain haemorrhage due to multiple fractures of the skull bones due to a fatal blunt head injury. The trial judge further found that the body examined was of a boy and the male genitalia was okay but in the process of decomposition.

4.2 The trial court also found that the circumstantial evidence implicating the appellant was so cogent as to take this case out of the realm of conjecture. In summation, the trial court found that the prosecution had proved its case beyond reasonable doubt. Subsequently, the appellant was convicted and sentenced to death.

5.0 GROUNDS OF APPEAL

5.1 Disconsolate with the conviction, the appellant filed three grounds of appeal couched as follows:

(1) The trial court erred in law and fact when the court found that the only inference to be drawn from the evidence

adduced was that the appellant herein murdered his daughter the deceased in this matter.

(2) The trial court erred in law and fact when the court found that the appellant's version of events that his deceased child was killed by someone else was a mere afterthought as it was not raised in the cross-examination of any of the prosecution witnesses.

(3) In the alternative, the trial court erred in law and fact when the court failed to find that there was an extenuating circumstance and imposed the death penalty on the appellant.

6.0 THE APPELLANT'S ARGUMENTS

6.1 The gist of the appellant's argument in support of ground one of the appeal was that the inference that the appellant herein murdered his daughter and buried her is not the only reasonable inference that can be drawn. It was contended that there are several other inferences that could be drawn from the facts of this case and that the trial court should have adopted the inference favourable to the appellant. To buttress this argument, we were referred to the case of **Dorothy Mutale and Richard Phiri v. The People**[1] where it was held that:

> **"Where two or more inferences are possible, it has always been a cardinal principle of criminal law that the**

court will adopt the one which is more favourable to an accused if there is nothing in the case to exclude such inference."

6.2 In support of the second ground of appeal, it was contended that the explanation given by the appellant was reasonably possible and the prosecution cannot be said to have discharged its burden of proof. 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."

6.3 We were urged to allow this ground of appeal and set aside the conviction for murder.

6.4 The gist of the appellant's arguments in support of ground three of the appeal is that in the event we find that there is overwhelming evidence that the appellant killed the deceased, there was extenuation due to the drunken circumstances attending upon the occasion.

6.5 We were referred to the case of **Justin Mumbe v. The People**[3] where it was held that **"drunken circumstances generally**

attending upon the occasion, sufficiently reduce the amount of moral so that there is extenuation."

6.6 We were urged to allow this appeal, quash the death sentence and impose any other sentence other than death.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, the learned counsel in responding to ground one of the appeal contended that PW1 properly identified the deceased body when the body was exhumed based on her black dress, black sweatshirt and maroon underwear that she wore and based on her face.

7.2 It was further contended that even though the postmortem examination was conducted on an African boy rather than an African girl, the court is not mandated to replace its decision with that of an expert witness. We were referred to the case of **Shawaz Fawaz and Another v. The People**[4] where it was held that:

> **"Evidence of an expert witness is his opinion and should not replace the decision of the court. The court ought to consider such evidence in light of all the available evidence and draw its conclusion."**

7.3 It was further contended that the trial court was on firm ground when it found that the body which was exhumed and a postmortem examination was conducted on, was that of Pelekelo Sangala a girl child and the deceased herein. It was contended further that the inference the trial court made was the only reasonable inference that could be drawn from the facts here.

7.4 In responding to the second ground of appeal, it was contended that the version of how the events unfolded by the appellant that the child was killed by someone else and that he just buried her did not arise when the prosecution witnesses were being cross-examined. And neither did this issue arise when the police were doing their initial investigation or when the appellant testified before the court.

7.5 According to learned counsel, the appellant's statement was a mere afterthought and cannot amount to a reasonable explanation. In support of this argument, we were referred to the case of **Donald Fumbelo v. The People**[5] where the Supreme Court observed that:

> **"When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that his version is an afterthought, therefore less weight will be attached to that a version."**

7.6 We were urged to dismiss this ground of appeal and uphold the conviction and sentence of the trial court.

7.7 In responding to the last ground of appeal, the state agreed with the finding of the trial court that there was no proof that the appellant was intoxicated at the time the alleged crime was committed, and no extenuating circumstances existed.

7.8 We were urged to dismiss this appeal and uphold the sentence of the trial court.

8.0 THE HEARING

8.1 At the hearing of this appeal, learned counsel for the appellant Mrs. Liswaniso informed the Court that she would rely on the filed heads of argument and learned counsel for the respondent Mr. Sakala, informed the Court that the state would equally rely on the filed arguments.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on record, the heads of argument filed by counsel and the judgment appealed against. We note that the question we are faced with for determination is whether the circumstantial evidence was sufficient to support the conviction.

9.2 We agree with the trial judge that this case rests on circumstantial evidence as none of the prosecution witnesses testified that they saw the appellant kill the deceased. It is well settled that circumstantial evidence may in certain instances be in fact the best form of evidence. It is proof of facts not in issue from which an inference maybe made which evidentially settles matters in issue.

9.3 The legal principles with respect to circumstantial evidence have been restated many times by the Apex court of this land, as well as this court. The position is that, in order to convict based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the accused's guilt.

9.4 In the celebrated case of **David Zulu v. The People**[6], the Supreme Court stated that:

> **"It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the facts in issue and from which an inference of the facts in issue may be drawn. It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstances and evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the**

realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilty."

9.5 In the case of **Saidi Phiri v. The People**[7] the Supreme Court went further and guided that:

> **"Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that, those further facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational reasoning process. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before it."**

9.6 With this guidance in mind, we will now consider whether the prosecution, through the circumstantial evidence adduced before the trial court, proved the case against the appellant beyond all reasonable doubt. Learned counsel for the appellant vehemently contended that

the circumstantial evidence in this case does not permit only one inference of guilt on the appellant. It was counsel's further argument that it is unclear what caused the death of the deceased as the postmortem examination was conducted on a male African child who was not the deceased in this case. On this point, the appellant stressed that his explanation as to what happened to the deceased was reasonable and ought to have been believed by the trial court.

9.7 On the other hand, the learned state advocate submitted that even though the postmortem examination was conducted on a male African child, the mother of the deceased had earlier identified the body of her daughter when the body was first exhumed.

9.8 What we derive from the set of facts on the record is that the deceased who was in the custody of his father died and he buried her. Upon the mother's complaint to the police and after the police questioned the appellant, he led them to a shallow grave where he had buried the deceased. Upon the body of the deceased being exhumed, the deceased's mother (PW1) identified the body. Later the police buried the body again as they waited for the pathologist to come and conduct a postmortem examination.

9.9 The body was not identified when the postmortem examination was conducted and the report indicated that the postmortem examination was conducted on a male African child when the deceased was a female African child.

9.10 A perusal of the judgment of the lower court reveals to us that the learned judge employed a meticulous analysis of this evidence and made many findings of fact as he set them out in his judgment. Those findings by the trial judge related to basic facts which he accepted as established. To secure a conviction, those basic facts presuppose other facts pointing to nothing else but the guilt of the appellant.

9.11 In dealing with the issue of what caused the death of the deceased, the trial court accepted the postmortem examination report and noted that the pathologist may have made a mistake on the sex of the deceased body. It is our view however that it was a grave error on the part of the trial judge to casually resolve the issue of the sex of the deceased. It seems to us that the trial judge took the liberty to fill the gaps in the evidence of the prosecution. The postmortem was conducted by a medical doctor, who knows very well how male or

female genitalia looks like. As such, his findings in this regard cannot be casually approached.

9.12 The Supreme Court in the case of **Elias Kunda v. The People**[8] held that:

> **"In cases where guilty is found by inference, as for instance, where the doctrine of recent possession is applied, there cannot be conviction if an explanation given by the accused, either at earlier stage (such as the police) or during the trial, might reasonably be true."**

9.13 In the light of the appellant's explanation, it was cardinal for the prosecution to establish that the deceased did not die from natural causes. The postmortem herein found that the examined body clearly died of unnatural causes. Unfortunately it was for a different person, not the deceased person herein. It would have been different if the mother to the deceased identified the body at the second exhumation and the prosecution then offered a credible explanation of the seemingly different sex observed by the medical doctor.

9.14 In the light of the circumstances, we hold the view that the circumstantial evidence does not permit only an inference of guilt, especially in the light of the appellant's explanation. We therefore find

merit in ground one of the appeal and we allow it. We find it unnecessary to consider the other grounds of appeal.

10.0 CONCLUSION

10.1 Having allowed the appeal, we set aside the conviction and sentence, acquit the appellant and set him at liberty forthwith.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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

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K. MUZENGA
COURT OF APPEAL JUDGE