IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 155/2021
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

JOHN DAKA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sharpe-Phiri and Muzenga JJA
On 14th June 2022 and 26th January 2024

For the Appellant: Mr. E. Mazyopa, Legal Aid Counsel, Legal Aid Board

For the Respondent: Ms. J. Banda, State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA, JA delivered the Judgment of the Court.

Cases referred to:

1. **Dorothy Mutale and Richard Phiri v. The People (1997) SJ 51 (SC)**
2. **Kalebu Banda v. The People (1997) ZR 169**
3. **The People v. Inonge Anayawa and Lubinda Sinjambi (2011) Vol 3 ZR 298**
4. **George Musongo v. The People (1998) ZR 266**

5. **Dickson Sembauke Changwe and Ifellow Hamuchanje v. The People (1988 – 1989) ZR 144**
6. **Saidi Phiri v. The People – Selected Judgment No. 30 of 2015**
7. **Nzala v. The People (1976) ZR 221**
8. **Mwiya and Ikweti v. The People (1968) ZR 53**
9. **Major Isaac Masonga v. The People (2009) ZR 242**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellant was sentenced to death by Newa, J following a conviction of murder. He has appealed against the conviction and sentence.

1.2 The particulars of offence alleged that on 21st June 2019 at Malewera in the Melewera District of the Republic of Mozambique, the appellant murdered one Fadalesi Phiri.

2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of four prosecution witnesses. A summary of the prosecution evidence is that the deceased and her children lived in a village located near the Mozambican border in the Katete District of Eastern Province. Early in

the morning on 21st June 2019, the deceased left home to go to the garden leaving the appellant, PW2 and one of their siblings at home. Shortly after that, the appellant equally left home heading the direction of the village and returned 3 hours later from the direction he had gone. The garden was situated on the Mozambican side. When she did not return in the evening, the appellant and PW2 followed her to the garden where they found her dead body.

2.2 The appellant proceeded to report the matter to the Mozambican authorities and investigations were instituted. A postmortem examination was also conducted by the Mozambican authorities after which the deceased body was released to the deceased's relatives for burial on the Zambian side. After the burial rites were concluded, PW3 phoned PW1, the mother of the deceased and informed her that the appellant opened a shop in Katete days after their mother's demise. This prompted PW1 and PW2 to travel to Katete to confirm.

2.3 When the appellant was asked about the shop, he denied running it but later he agreed and his landlord confirmed. According to PW1, PW2 and PW3, the appellant confessed to having killed his mother so that he could get the money which he used to open the said shop.

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. The appellant denied having confessed to the witnesses. Instead, he accused them of various reasons for their motive to implicate him. During cross-examination, he wondered on why they had not called his landlord who was present as an independent witness. He alleged that he started running the shop with his wife in 2016. He further stated that on the material date, he went to put up posters to advertise his show in Mozambique as he was a musician and that he was with Amon after which he returned home with Amon.

3.2 This marked the end of the defence case.

4.0 FINDINGS AND DECISION OF THE TRIAL COURT

4.1 After consideration of the evidence before her, the learned trial Judge found that the cause of death was a serious skull trauma and the direct cause of death was cardiac arrest. The trial court also found that there was no direct evidence that the appellant killed the deceased.

4.2 The trial court concluded that the prosecution had proved its case beyond reasonable doubt. The appellant was later sentenced to death by hanging until he was pronounced dead.

5.0 GROUNDS OF APPEAL

5.1 Embittered with the conviction and sentence, the appellant filed two grounds of appeal couched as follows:

(1) The learned trial court erred in law and in fact, in convicting the appellant on circumstantial evidence when an inference of guilt was not the only inference which could be drawn from the facts.

(2) The learned trial judge erred both in law and in fact in convicting the appellant based on the evidence of a suspicious confession.

6.0 THE APPELLANT'S ARGUMENTS

6.1 The kernel of the appellant's arguments in support of ground one is that the circumstantial evidence in this case did not help to prove the allegation against the appellant to warrant his conviction. It was learned counsel's submission that the evidence of the prosecution on the reason why the appellant may have killed the deceased was inconsistent. PW1 informed the court that the appellant killed the deceased because he wanted money and after the deceased died, the appellant opened a shop. While PW3 told the trial court that the

appellant told her that he killed the deceased because the deceased wanted to kill one of her children.

6.2 It was learned counsel's further submission that it does not add up why the people who were present when the appellant is said to have confessed to killing the deceased had different testimonies on the appellant's motive. We were referred to the case of **Dorothy Mutale and Richard Phiri v. The People**[1] in which the Supreme Court held that:

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

6.3 It was submitted that the trial court should have adopted the inference which is more favourable to the appellant which is that the moment he left home he was with his friend Amon and that he had no opportunity to commit this offence.

6.4 It was contended further that the appellant testified that he opened the shop in 2016 while the prosecution witnesses stated that he opened the shop after the deceased died and failed to bring the landlord to court to prove their accession. Learned counsel went on to

submit that the dealing officer had a legal duty to establish whether the appellant was with his friend Amon for the three hours he left home, but failed to investigate this fact. We were referred to the case of **Kalebu Banda v. The People**[2] where it was held that:

> **"Where evidence available only to the police is not placed before the Court it must be assumed that, had it been produced, it would have been favourable to the accused. In this context "available" means "obtainable" whether or not actually obtained."**

6.5 In support of ground two of the appeal, it was contended that the purported confession by the appellant is suspicious because none of the witnesses who witnessed the confession, made a statement about it to the police. It was contended further that there is no record from the police which indicates that the appellant made any confession. Counsel concluded that the evidence was an afterthought.

6.6 We were urged to allow this appeal, acquit the appellant and set him to liberty.

7.0 THE RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, learned counsel supported the conviction and sentence of the appellant for the offence of murder. It was contended that the confession on which the appellant was convicted

was not suspicious and that a confession when properly proved is the best evidence that can be adduced. To buttress this argument, we were referred to the case of **The People v. Inonge Anayawa and Lubinda Sinjambi[3]** where it was held that **"Where a confession is proved, it is the best evidence that can be proved."**

7.2 It was contended further that a confession is subject to evidentiary exclusionary rules when it is made to a person in authority. Thus when the confession statement is made to a person who is not in authority, there are no problematic attendant evidentiary exclusionary rules. According to learned counsel, in this case, the confession was made to PW1, PW2 and PW3 who are not persons in authority and there was no evidence of an unfair environment that could have forced him into making the confession thus leading to its exclusion.

7.3 We were referred to the case **George Musongo v. The People[4],** where it was held that:

> **"The Judges' Rules were formulated for the guidance of police officers, they put police officers on guard with regard to what type of conduct on their part will, or will not, be regarded by judges as improper or unfair vis-a-vis a person suspected of having committed a crime. However, the principles of fair conduct underlying the Judges' Rules are principles in their own right independently of those rules, and unfair or improper**

conduct on the part of people other than police officers can equally lead to the exclusion of evidence in the discretion of a court. The dictum in Chinyama v. The People (1) cited with approval. In all cases the issue must always be whether the accused was so unfairly or improperly treated in all the circumstances that the evidence ought to be rejected. Whereas failure on the part of a police officer to administer a caution constitutes an impropriety in respect of which a trial court may exercise its discretion in favour of the accused, similar failure on the part of any other person in authority (or indeed anybody else) does not necessarily amount to an impropriety as it cannot reasonably be expected that a person, other than a police officer, should of necessity appreciate the niceties of what should, and should not, be done in such circumstances."

7.4 In responding to the appellant's contention that the prosecution witnesses gave different stories on the motive why the appellant may have killed the deceased, it was learned counsel's submission that the discrepancies are minor and do not go to the root of the matter and are not fatal. We were referred to the case of **Dickson Sembauke Changwe and Ifellow Hamuchanje v. The People**[5] where the Supreme Court stated that:

"For discrepancies and inconsistencies to reduce or obliterate the weight to be attached to the evidence of a witness, they must be such as to lead the court to entertain doubts on his reliability or veracity either generally or to particular points. To show that PW8 had given evidence which differed so insignificantly from his

statement to the police or to show, as counsel endeavoured to do, that there were some items of inconsequential detail which were given or omitted on one or other of the occasions does not assist and cannot result in the court holding in effect that PW8 is not credible and had probably made up the whole story against the appellants."

7.5 According to the learned state advocate, the circumstantial evidence on the record supported by the confession by the appellant as well as the fact that the appellant opened a shop shortly after the demise of his mother leads to only an inference that it was indeed the appellant that killed the deceased. We are referred to the case of **Saidi Banda v. The People**[6] where the Court guided that:

"We must state at the outset that it is competent in some instances to convict upon circumstantial evidence. The law with respect to circumstantial evidence has been restated many times by this court, and it 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."

7.6 In summation learned counsel urged us to uphold the conviction and sentence of the lower court and dismiss this appeal for lack of merit.

8.0 HEARING OF APPEAL AND ARGUMENTS CANVASSED

8.1 At the hearing of the appeal, learned counsel for the appellant, Mr. Mazyopa, placed full reliance on the documents filed. On behalf of the state, Ms. Banda informed the court that the state would equally rely on the heads of argument filed before the court.

9.0 CONSIDERATION AND DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by counsel and the judgment of the court below. We shall consider the two grounds of appeal together as they are related. The issue in this appeal is whether on the evidence on record, a conviction was warranted.

9.2 We firstly wish to comment on the postmortem examination which was conducted in Mozambique and the report **"P2"** which was generated, and subsequently admitted into evidence in the court below. This postmortem report should not have been admitted in evidence in the absence of the pathologist or doctor who conducted it coming before the lower court to produce it. This is because it was not prepared by a medical officer employed in the public service. Therefore, the learned trial court should not have allowed the production into

evidence of **"P2"** and consequently **"P3"** (which was the English translation of **"P2"**) without the expert who conducted the examination giving evidence in court (see **Section 191A of the Criminal Procedure Code, Chapter 88 of the Laws of Zambia**). We therefore expunge **"P2," "P3"** and any other evidence premised or birthed therefrom.

9.3 Despite having expunged the postmortem report establishing cause of death, we are still satisfied on the evidence that the deceased did not die a natural death as physical injuries on her body were observed, and presence of blood stains at the scene clearly shows that this was a homicide case.

9.4 Learned counsel for the appellant submitted that the circumstantial evidence on the record was not sufficient to warrant a conviction whereas learned counsel for the state submitted that the circumstantial evidence was sufficient. We hold the view that this case is not really anchored on circumstantial evidence. It revolves around confession evidence, which issue we shall revert to later. Learned counsel further argued that the appellant put up an alibi which the police did not

investigate, neither did they call Amon who the appellant purported to have been with.

9.5 According to the arresting officer, PW4, the appellant did not tell him about his alleged alibi. Therefore, the police did not have a duty to investigate the alibi. In the case of **Nzala v. The People**[7] the Supreme court held that:

> **"(i) Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it.**
>
> **(i) That duty is not discharged by the investigating officer simply interviewing the people concerned, taking no statements and remaining silent on the matter; had counsel for the defence not asked certain questions of the investigating officer in cross examination the record would have been silent as to whether the alleged alibi had been investigated.**
>
> **(ii) If in fact the various witnesses mentioned by the appellant had given information which was no support for his case, this was important evidence in support of the prosecution case and should have been led by the prosecution; this is the standard procedure and the failure to lead this evidence must always be a matter of severe comment."**

9.6 We therefore have no hesitation in finding the argument that the failure to investigate the alibi amounted to a dereliction of duty to be without merit. If the appellant, not having told his alibi to the police wanted to rely on it, he should have led evidence sufficient enough for the trial Judge to deliberate on it. The appellant having failed to do so, the trial court cannot be faulted for rejecting the alibi.

9.7 We now revert to the issue of a confession. We have already stated that this is not a case anchored on circumstantial evidence. In as much as there is no eye witness to the murder, we have direct evidence of a confession. According to PW1, PW2 and PW3, the appellant admitted to them to having killed his mother. The appellant on the other hand denied the confession. Learned counsel for the appellant argued that there were discrepancies on the motive for killing the deceased as narrated by the witnesses. PW1 and PW2 stated that the appellant said that he killed his mother because he wanted money, whereas PW3 said the appellant killed the mother because he wanted to kill one of them (her children). Counsel has argued that the doubt created by the discrepancy should be resolved in the appellant's favour. Learned

counsel for the respondent argued that the discrepancy is insignificant and does not go to the root of the matter and is not fatal.

9.8 We agree with learned counsel for respondent that the discrepancy is minor. The motive for killing someone, especially in the circumstances of this case, does not affect criminal liability. The important issue is whether the appellant admitted to killing his mother. The appellant having denied confessing to having killed his mother, the question became a credibility one, which the trial court resolved. The trial court believed the evidence of the three witnesses as opposed to that of the appellant. We see nothing on the record to warrant us to interfere with this finding. The trial court had the opportunity to observe the witnesses, assess their evidence and make the findings. The trial court was on firm ground.

9.9 Further, the witnesses who narrated the confession to the court were the appellant's own relatives, among which PW2 was his own biological brother. There is no legal requirement that a confession should be corroborated, especially in this case, where his own relatives brought the confession to the fore. In the case of **Mwiya and Ikweti v. The People**[8] the Supreme Court held that:

> **"(i) An extra-curial confession made by one accused person incriminating other co-accused is evidence against himself and not the other persons unless those other persons or any of them adopt the confession and make it their own.**
>
> **(ii) <u>A conviction can be based on a well-proved uncorroborated confession; Hamainda v. The People (4), disapproved.</u>**
>
> **(iii) In order to establish aiding and abetting on the ground of encouragement, it must be proved that the appellants intended to encourage and wilfully encouraged the crime committed. Mere presence at the scene of crime even though non-accidental does not per se amount to encouragement." (emphasis ours)."**

9.10 The appellant did not allege their being bad blood with his biological brother (PW2) and the other witnesses, or that he was beaten, threatened, neither did he allege any unfair conduct at the time he allegedly confessed to warrant the exclusion of the same, in terms of the case of **Major Isaac Masonga v. The People**[9]. He simply denied the confession. We can therefore not fault the learned trial court for relying on the confession to convict the appellant. We find no merit in the appeal.

10.0 CONCLUSION

10.1 Having found no merit in the appeal, we dismiss it. The conviction and sentence is upheld.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE

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