

IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO. 30/2023
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

LIKANDO SIMUNOMA

VS

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe JJA

ON: 20th February 2024 and 23rd February 2024

For the Appellant: M. Mulanda Banda, Legal Aid Counsel, Legal
Aid Board

For the Respondent: S. Muwamba, Deputy Chief State Advocate,
National Prosecutions Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court

Cases referred to:

1. David Zulu v. The People [1978] Z.R. 271
2. Dorothy Mutale v. The people [1975-1997] Z.R. 102
3. Michael Njobvu v. The People, SCZ Judgment No.17 of 2011
4. Kangwa Esther Rozaria v. The People, SCZ Appeal No. 167 of 2020
5. Gasanalieu v. The People [2010] Z.R. 132
6. Lupupa v. The People [1977] Z.R. 38

Legislation referred to:

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

INTRODUCTION

[1] The appellant appeared before the High Court (Maka, 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 of committing the offence and condemned to suffer capital punishment.

[4] He has appealed against the conviction.

CASE BEFORE THE TRIAL COURT

[5] On 6th November 2021, Mukela Mukela, the appellant's son, picked up a quarrel with Joseph Alibandila, at a drinking place.

[6] Joseph Alibandila, who was in the company of his wife, Charity Mubita, decided to leave the drinking place for home.

[7] Mukela Mukela followed Joseph Alibandila and insulted him as he walked home with his wife. Joseph Alibandila

apprehended Mukela Mukela and took him to the appellant's house.

[18] The appellant advised Joseph Alibandila that issue could best be resolved the following morning and retreated to bed. Joseph Alibandila did not take the advice and ended up in a scuffle with Mukela Mukela.

[19] The noise from the scuffle caused the appellant to come out of the house and he struck both Joseph Alibandila and his wife.

[10] They both lost consciousness, but regained it shortly. They then left for home.

[11] From that point Charity Mubita complained of having a headache. The incident was reported to the police on 8th November 2021.

[12] She was attended by a doctor on 10th November 2021. It is not clear the type of medical intervention she received, but she was not admitted into the hospital.

[13] On 27th November 2021, Charity Mubita was rushed to the hospital after she complained of heart palpitations, she died the same day.

[14] When a post-mortem was conducted on her body, the pathologist found the cause of her death to be severe head injuries.

[15] The pathologist observed "multiple hematomas under the scalp. Skull bones were broken on left side. Brain was damaged. Presence of intracranial haematomas. Bruises under the skin on front side of the chest. Ribs were broken on right side.

[16] In his defence, the appellant did not deny assaulting Charity Mubita. He claimed that he only slapped her. He denied striking her on the eye.

[17] During the trial, the pathologist who conducted the post-mortem was not available. The State called an orthopaedic surgeon, of 18 years standing and head of the surgical department at the hospital where the post-mortem was conducted, to give evidence.

[18] The orthopaedic surgeon opined that a person who had suffered the injuries reported in the post-mortem report, would lose consciousness immediately or not more than 48 hours later.

[19] Asked what his reaction would be to the fact that the patient was actually walking 20 days after

suffering those injuries, he opined that a person with such injuries could not live for 20 days.

[20] The trial Judge concluded that in the absence of *novus actus interveniens*, the death of Charity Mubita could only be attributed to the assault she suffered at the hands of the appellant.

[21] She found that the evidence proved the charge of murder because by striking her on the head, the appellant should have known that he was likely to cause her grievous harm.

THE APPEAL

[22] The issue that this appeal raises is whether the charge of murder was proved in the face of the medical evidence that the injuries Charity Mubita suffered, could not have allowed her to remain conscious 48 hours after the assault.

[23] Mrs. Mulanda-Banda referred to cases including **David Zulu v. The People**¹, and submitted that the prosecution's case fell short of evidence on which a conviction could be anchored on circumstantial evidence.

[24] She argued that the surgeon's opinion that the injuries suffered could have instantly caused death raised the possibility that the injuries that caused Charity Mubita's death, could have been suffered subsequent to the assault.

[25] Mrs. Mulanda-Banda also referred to the case of **Dorothy Mutale and Richard Phiri v. The People**² and submitted that there being two possibilities, the court should have drawn an inference more favourable to the appellant and found that she died from injuries caused by a subsequent incidence.

[26] Ms. Muwamba argued that in the absence of *novus actus interveniens*, the trial Judge was entitled to accept that the assault caused the death.

[27] She referred to the case of **Michael Njobvu v. The People**³ in support of the propositions.

[28] Ms. Muwamba also was referred to the case of **Kangwa Esther Rozaria v. The People**⁴ and pointed out that the surgeon's conclusion was just his opinion and the trial Judge was not bound by it.

[29] Further, going by the decision **Gasanalieu v. The People**⁵ and trial Judge was entitled to come up with

her own conclusion after considering the findings of the expert witness.

CONSIDERATION OF THE APPEAL

[30] In the case of **Michael Njobvu³ v. The People**, Chibomba JS, delivering the judgment of the Supreme Court, stated as follows:

"In this case, the death was within a year and one day after the appellant was seen hitting the deceased with the sharp side of the slasher using a lot of force to such an extent that the deceased was failing to stand up. The evidence was also that the deceased's chest was swollen and that even though he was discharged from the hospital the day after he was admitted, the deceased was not well because his stomach was hurting and his hands were swollen. And that the deceased was purging and urinating blood and that his condition never improved until his death.

In view of the above evidence, there can be no doubt that the deceased died as a result of the injuries that he sustained after a brutal assault by the appellant. Therefore, the learned judge was on firm ground when he convicted the appellant of murder on the basis of the principle in *Njunga and Others v. The People*."

[31] In our view, the circumstances in the case of **Michael Njobvu v. The People³**, can be distinguished from the circumstances of this case.

[32] In that case, there was no medical evidence of the cause of death, while in this case, a post-mortem was

conducted to determine the cause of Charity Mubita's death.

[33] In the earlier case of **Lupupa v. The People**⁶, the Supreme Court held that medical evidence, while weighty, is only one of the factors a court should take into account when deciding the culpability of an accused person.

[34] The court went on to hold that even if the medical evidence is just an opinion of the doctor, there must be a basis for the trial court rejecting such an opinion.

[35] This position was reaffirmed in the recent case of **Kangwa Esther Rozaria v. The People**⁴. Delivering the decision of the Supreme Court, Hamaundu JS, pointed out the following:

"Hence, while a trial court is not bound by the opinion, or conclusion, made by an expert on his findings, it is not entitled to reject or ignore the experts finding merely on the ground that it is not bound by the expert's opinion, as the learned judge did in this case. Like in the case of any other evidence of fact, the court may only refuse to accept the expert's finding if there is other evidence discrediting it"

[36] In this case, the trial Judge did not consider the opinion of surgeon who produced the post-mortem report and opined that the brain damage suffered by Charity Mubita, could not have allowed her to remain conscious for a period of more than 48 hours after the assault.

[37] She however accepted the findings that her death was due to the injuries set out in the report.

[38] The trial Judge erred because going by the decision in **Kangwa Esther Rozaria v. The People⁴**, she was obliged to consider the surgeon's opinion and not ignore it.

[39] In our view, that evidence was crucial because it raised doubts on whether the assault by the appellant was the sole cause of the injuries that led to Charity Mubita's death.

[40] Even if she complained of not feeling well after the assault, given that she was not confined to any place, it is possible that the injuries that caused Charity Mubita's death could have been suffered after the assault.

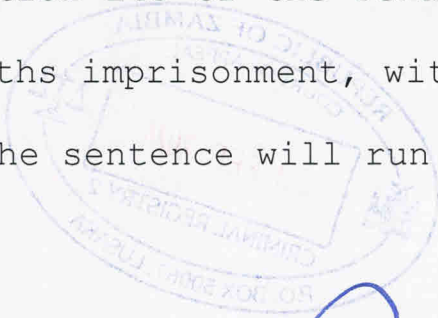
[41] In the circumstances, it is our view that the conviction is unsafe and we set it aside.


VERDICT

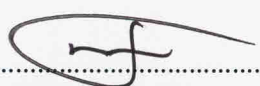
[42] It not being in dispute that the appellant assaulted Charity Mubita and she suffered injury, we are satisfied that the evidence did prove the lesser charge of assault occasioning actual bodily harm, contrary to **Section 248 of the Penal Code.**


[43] Consequently, we convict the appellant of the charge of assault occasioning actual bodily harm, contrary to **Section 248 of the Penal Code** and sentence him to 30 months imprisonment, with hard labour.

[44] The sentence will run from 20th December 2021.




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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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


.....
Y. Chembe
COURT OF APPEAL JUDGE