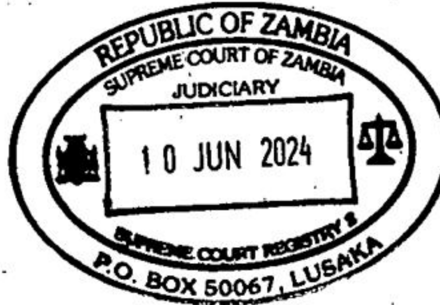
IN THE SUPREME COURT FOR ZAMBIA APPEAL No. 473/2013
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:



STEPHEN MWAPE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Hamaundu, Kaoma, and Chinyama, JJS
On 4th June 2024 and 10th June, 2024

For the Appellant : Mr. B. Banda - Senior Legal Aid Counsel

For the Respondent : Mrs. M. P. Lungu – Deputy Chief State Advocate

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JUDGMENT

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Lameck Namushi and Another v. The People – SCZ Appeal No. 46 of 2020**
2. **Saidi Banda v. The People – SCZ Appeal No. 144 of 2015**
3. **Andrew Mwenya v. The People – SCZ Appeal No. 640 of 2013**
4. **Lubinda v. The People (1973) Z.R. 151**
5. **Dorothy Mutale and Another v. The People (1997) Z.R. 51**
6. **David Zulu v. The People (1977) Z.R. 151**
7. **James Mwango Phiri v. The People – SCZ Appeal No. 171 of 2015**
8. **Joseph Mulenga and Another v. The People (2008) volume 2 Z.R. 1**
9. **Haamenda v. The People (1977) Z.R. 184**

Legislation referred to:

1. **Penal Code, Cap 87 of the Laws of Zambia, sections 200 and 204**

1. Introduction

1.1 This appeal is against conviction only. The appellant was convicted by the High Court sitting at Kitwe (Makungu, J as she then was) on one count of murder contrary to **section 200** of the **Penal Code**. It was alleged that he murdered Philemon Chola on the 14th day of May 2012 at Kitwe.

2. Evidence before the Court

2.1 In order to prove the case against the appellant, the prosecution called six witnesses: Osborne Mantelo (PW1), Moses Mukanda (PW2), Grace Isanda (PW3), Joyce Kapya (PW4), Peter Kapya (PW5), and the arresting officer, Detective Constable Steward Chimbinga (PW6).

2.2 PW1, was a supervisor at P and M Lamber Enterprises Limited, where the deceased worked as a security guard and PW2 was their superior. The appellant was also a guard but he worked for a different company on the same premises. According to PW1, on Sunday 13th May 2012, around 17:30 hours, he gave the deceased K5,000 to buy dog food and when he knocked off from work he left two people on the premises, namely the appellant and the deceased.

2.3 The following morning, PW1 did not find anyone at the workshop. When he asked the appellant about his friend (the deceased), he responded that when PW1 gave him the money to buy dog food, he went away and did not return to work. PW1 informed PW2 about what the appellant had said. Later, that morning, PW1 went to fetch water from a well which was behind their office and discovered a human body in the well. He informed PW2 who reported the matter to the police.

2.4 After the police retrieved the body from the well, they discovered that it was Philemon Chola. They observed that his stomach was not swollen, as would have been the case if he had drowned. PW1 said the deceased looked stiff and had bitten his tongue but PW2 did not mention this detail.

2.5 The evidence shows that there were three offices in the same workshop made out of planks and there was a boundary wall fence around the premises. The yard was about 100m and was divided in half. The appellant and the deceased guarded different areas. The well was behind the office, away from the side the appellant worked and there were no lights in the yard at night. The lights were only in the workshop.

2.6 In cross-examination, PW1 had testified that the appellant and deceased were friends and every day when they knocked off, they usually left them chatting. The next morning, when he asked the appellant about his friend, he said he did not know where he was. PW1 also disclosed that they would give the deceased money for dog food on Sunday and he would buy the food whilst they were working but on the date in question, he did not know when the deceased went to buy the dog food.

2.7 PW3, a housewife and neighbour to PW4 and PW5, testified that on a date she could not recall, the appellant went to her home between 07:00 hours and 08:00 hours in the morning and asked her whether she had seen Chola. She said she had not and had last seen him a day or two before. The appellant told her that he had spent the night alone at the sawmill and that he had not seen his friend. Later that morning, she learnt about the body found in the well at the sawmill, which turned out to be Chola's.

2.8 PW4 also heard about the body in the well at the sawmill where the deceased, a nephew to her husband worked and went there around 10:00 hours. She saw the body in the well and only identified it as Chola's body after it was retrieved from the well by the police.

2.9 PW5, identified the deceased's body at Nchanga North hospital before the post mortem. To him, the body looked swollen on the head and rib area. PW6 received the report from PW2 about the discovery of the deceased's body in a shallow well. He went to the scene and retrieved the body. He attended the post mortem on 16th May 2012 which was conducted by Dr. Mubikayi after the body was identified by PW5. He noted the injuries on the body as disclosed in the post mortem report produced as exhibit P1. Subsequently, he apprehended the appellant, interviewed him and arrested him for the murder of the deceased.

2.10 In his defence, the appellant denied any involvement in the deceased's murder. He said he worked for PATCAP where there was a sawmill. He went to work at 17:00 hours and worked well until morning when he knocked off. Later, he was picked by the police and told that he killed someone and they placed him in custody. The next day they took a statement from him and charged him for murder. He denied the charge and knowing Chola or working with him. He alleged that he was badly beaten.

2.11 In cross-examination, he said he knew the deceased as a person he worked with in the same area and not as a workmate or friend; and that he would not know when and if he reported for

work every day as the distance between their work area was big. He agreed that he would know if someone had entered the yard; that he worked very well before he knocked off; that there was no break-in; that he was in the yard the whole night; and that nothing went missing in his work area and the other companies. He said since the yard was open and there were no lights, they would just find a place to sit and look around at a distance.

3. Decision by the High Court

3.1 The learned trial judge considered the circumstantial evidence before her and made several findings of fact. She was satisfied that the appellant was responsible for the death of the deceased and that he had the requisite malice aforethought.

3.2 The learned judge also found that the prosecution evidence was more compelling than that of the appellant and convicted him of murder and sentenced him to death.

4. Appeal to this Court and arguments by the parties

4.1 Aggrieved by his conviction, the appellant filed this appeal advancing three grounds as follows:

4.1.1 The learned trial Judge erred both in law and fact to convict the appellant for murder on circumstantial evidence that was not sufficiently cogent as to take the case out of the realm of conjecture to afford the court to draw an inference of guilty as the only inference available given the set of facts before it.

4.1.2 The trial court erred both in law and fact when it found as a fact that PW1 and 3 had no motive to lie when in fact PW1 was a witness with a possible interest of his own to serve while PW3's statement was inadmissible extra-judicial evidence.

4.1.3 The court erred both in law and fact to draw an inference from facts before it that there were only two people in the premises on 13th May, 2012 from 17:00 hours onwards when there were other inferences available.

4.2 In brief, learned counsel for the appellant submits that the circumstantial evidence that was before the court, such as the opportunity to commit the offence, the 'last seen with' principle, and the inferences drawn from the evidence of PW1 and PW3 were insufficient to link the appellant to the murder, without establishing the motive for the killing.

4.3 Counsel submits that the trial court chose to accept the prosecution evidence as being more consistent than that of the appellant because he went to ask PW3 if she had seen the deceased on the day the body was retrieved from the well while in court he was indifferent as to whether he had been at work.

4.4 According to counsel, the finding by the court raises the question of when does an accused person's defence begin and whether a statement made to a witness outside court would discredit his testimony given in court.

4.5 In response to ground 1, Mrs. Lungu submits that the 'last seen with' theory applies to this case, signifying that the appellant,

being the last person seen with the deceased, may be presumed to be responsible for his death and it is crucial to consider the time they were last seen together, the time the deceased was found dead and the explanation tendered by the appellant.

4.6 Counsel cites the case of **Lameck Namushi and another v The People**[1] submitting that the two were last seen together around 17:00 hours and the next day the deceased was found dead on the same premises they were last seen together and the explanation by the appellant that he did not know anything as the yard was big could not reasonably be true considering the entire evidence on record.

4.7 She notes that the appellant agreed that there was no break-in and nothing was stolen from the premises. Based on the case of **Saidi Banda v. The People**[2], she submits that when the evidence is looked at holistically, the trial court was justified to convict the appellant on the circumstantial evidence presented.

4.8 In support of ground 2, Mr. Banda submits that the purported self-incriminating statements the appellant allegedly gave to PW1 and PW3 were extra-judicial statements; and his failure to repeat them in court was not fatal. Counsel cites the definition

of 'extrajudicial' in Black's Law dictionary and refers to a Nigerian case on the same point.

4.9 He further contends that PW1 was not a credible witness and that his evidence was suspect because he knew that the deceased had the K5,000 so he could have been involved in his murder. Counsel argues that it was not clear whether the money was recovered or the dog food bought and PW1 and PW6 concealed this vital fact to establish motive and that the failure to investigate what happened to the money was a dereliction of duty on the part of PW6 and raised serious doubt and discrepancy in the prosecution case.

4.10 Counsel cites another Nigerian case as to the prosecution's burden to prove a charge beyond reasonable doubt and submits that the judge preferred PW1's evidence to the appellant's without giving reasons; that the proof offered by PW1 of placing the appellant at the scene and the suggestion that he was the murderer lacks clarity; and that no reasonable tribunal would exclude other inferences tending to support the defence case.

4.11 With regard to ground 2, Mrs. Lungu defends the trial court's acceptance of the testimony of PW1 and PW3, arguing that there was no evidence to show that they had interests of their own to

serve. She relies on the case of **Andrew Mwenya v The People**[3] and refers to the trial court's conclusion that the prosecution evidence was more consistent than that of the appellant.

4.12 Mrs. Lungu also cites the case of **Lubinda v The People**[4] to show that it is open to any court to find that they believe witnesses and do not believe other witnesses and submits that PW1 and PW3 were witnesses of fact and contrary to the appellant's argument their evidence of what he told them does not amount to self-incrimination, and if it did, it would still be admissible as the two witnesses were not persons in authority.

4.13 She further argues that the absence of an investigation into the money the deceased was given for dog food, cannot materially affect the prosecution evidence. In conclusion, she implores us to dismiss the appeal and to uphold the conviction.

4.14 The gist of Mr. Banda's contention in ground 3 is that any other person could have attacked the deceased or he fell into the well on his own accord because the evidence that he bit his tongue was synonymous with someone who suffered an epileptic seizure and no evidence was led that the deceased had no underlying health condition.

4.15 He suggests that PW6 and the pathologist conveniently neglected to follow this lead; that had they done so, this would have exonerated the appellant because the cause of death would have been established as most probably epileptic seizures, as a result of which the deceased could have fallen into the well and sustained the injuries revealed in the post mortem report.

4.16 Counsel cites the case of **Dorothy Mutale and Another v. The People**[5], submitting that there were other inferences the court could have drawn other than that the deceased died from head injuries due to assault. In conclusion, he urges us to overturn the conviction because the prosecution failed to establish guilt beyond reasonable doubt.

5. Our consideration of the Appeal and Decision

5.1 We have considered the evidence on record, the judgment appealed against and the arguments by learned counsel on both sides. The main issue raised by this appeal is whether the learned trial judge was justified in drawing an inference of guilt from the circumstantial evidence at her disposal. The three grounds of appeal are related and shall be dealt with all at once.

5.2 It is accepted that there was no direct evidence connecting the appellant to the murder of the deceased. The evidence against

him was purely circumstantial and what we said in the case of **David Zulu v. The People**[6] and later in the case of **Saidi Banda v. The People**[2], applies fully to this case. Therefore, this Court is tasked with determining whether, through the available circumstantial evidence, the prosecution had proved the case against the appellant beyond all reasonable doubt.

5.3 The appellant's position is that the circumstantial evidence at the disposal of the court, particularly the opportunity to commit the offence, the 'last seen with' principle, and the supposedly incriminating statements given in evidence by PW1 and PW3 were insufficient to link the appellant to the murder, in the absence of motive. As rightly submitted by Mrs. Lungu, the evidence must be examined holistically because if considered independently, the different strands of circumstantial evidence may seem insufficient to found a conviction.

5.4 The learned trial judge found as a fact that the appellant and the deceased were friends because PW1 and PW3 had no motive to lie about that; that the two were usually together at work; and that PW1 left them together chatting around 17:00 hours on 13th May, 2012. The finding by the trial judge that the appellant and the deceased were friends because PW1 and PW3 had no

motive to lie about that has met with displeasure in ground 2 of this appeal. We want to resolve this issue now.

5.5 Three points have been made by Mr. Banda on behalf of the appellant. The first relates to the purported self-incriminating statements given to PW1 and PW3. The second is that PW1 was not a credible witness and his evidence was suspect since he knew that the deceased had the K5,000 on him. The third is that the failure to investigate what happened to the money amounted to dereliction of duty on the part of PW6.

5.6 PW1's evidence which the trial judge accepted was that the appellant and the deceased were friends and that every day when they knocked off from work they usually left them chatting. In fact, according to the evidence of PW1, he gave the deceased the money for dog food around 17:30 hours and he left the appellant and the deceased together when he knocked off.

5.7 While the appellant admitted that he knew the deceased as a person he worked with in the same area, he refused that he was a workmate or friend. However, PW3 also gave evidence of her encounter with the appellant in the morning of 14th May 2012 before the body of the deceased was even discovered in the well.

5.8 Her evidence shows that the appellant told her when he went to her house to ask about the deceased that he had spent the night alone at the sawmill and he had not seen his friend. She knew the appellant because he used to buy cigarettes from her house. She did not know why he asked her about the deceased and she admitted that she would not know what kind of association the two had. Her evidence that the appellant went to ask her about the deceased was never challenged by the defence.

5.9 Coming to the issue raised by Mr. Banda as to when an accused should start to build up his defence regarding the self-incriminating statements the appellant made to PW1 and PW3, we said in the case of **James Mwango Phiri v. The People**[7] that:

> "**.... a person accused of an offence and on trial begins to build his/her defence right from the time of apprehension and from the first prosecution witness by asking questions in cross-examination. When an issue or defence is only raised when the accused is on the stand, the court cannot be faulted for treating it as an afterthought and an explanation which cannot reasonably be true**".

5.10 Furthermore, in **Joseph Mulenga and Another v. The People**[8] we put the matter as follows:

> **"During trial parties have the opportunity to challenge evidence by cross-examining witnesses. Cross-examination must be done on every material particular of the case. When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those facts which are disputed. Leaving assertions which are incriminating to go unchallenged, diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial".**

5.11 Mr. Banda is under the misconception that the statements the appellant made to PW1 and PW3 were extrajudicial statements and could not be used by the trial court as the basis for holding that the prosecution evidence was more consistent than the appellant's evidence. We must state that admissions or incriminating statements made or given to witnesses who are not persons in authority, are as, properly submitted by Mrs. Lungu, admissible in evidence against the maker.

5.12 Again, as rightly submitted by Mrs. Lungu, PW1 and PW3 were witnesses of fact it is open to a trial court to find that they believe some witnesses and do not believe other witnesses (See **Lubinda v The People**[4]).

5.13 In this case, the learned judge believed the evidence of PW1 and PW3 and rejected the appellant's evidence that the deceased was not his friend and that he did not know whether or not he had reported for work that day. The view we take is that the learned judge was entitled to do so on the evidence on record and we find no basis on which to fault her conclusion that the appellant and the deceased were friends.

5.14 Besides, PW1 never suggested in his evidence that the appellant was the killer. He testified that after the deceased's body was taken away by the police, he remained wondering what happened the previous night and he found no answer. Neither did PW3 point at the appellant as the murderer for the court to question the credibility of their evidence.

5.15 As regards, the K5,000 given to the deceased to buy dog food, obviously, PW1 knew that he had the money because he gave it to him after it was given to him by PW2. The appellant also knew that the deceased had the money because in the morning when PW1 asked him about the whereabouts of his friend, he said he went away after he was given the money and did not return.

5.16 According to Mr. Banda, the amount of money given to the deceased was quite substantial and anyone, including PW1 could have killed him for it. We do not agree with this suggestion. The question of PW1 being a possible suspect, never arose in the cross-examination of this witness and it does not seem to us that the money was the motive for the killing.

5.17 Moreover, we are not persuaded by Mr. Banda's submission that PW1 and PW6 concealed the issue of the missing money or that the failure by PW6 to investigate what happened to the money

amounted to a dereliction of duty on his part so as to raise serious doubt and discrepancy in the prosecution case. We held in the case of **Haamenda v. The People**[9] that:

> **"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the investigating agency fails to investigate it in circumstances amounting to a dereliction of duty, and in consequence of that dereliction of duty, the appellant is seriously prejudiced because the evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty."**

5.18 There was no suggestion by the defence in the present matter that the money given to the deceased for dog food was missing or was stolen and we do not believe that the nature of this case necessitated that the issue of the money be investigated. Further still, this issue was not raised by the defence in the cross-examination of PW1, PW2 and PW6 and the appellant did not show that he was seriously prejudiced by the non-investigation of the whereabouts of the money.

5.19 In any case, the non-investigation of what happened to the money, does not, in our view, disprove the fact that the deceased was killed on the business premises between 17:30 hours when PW1 gave him the money and the morning when his body was found in the well. On the basis of all the foregoing, we find no merit in ground 2 of this appeal.

5.20 Turning back to ground 1 and the issue of the circumstantial evidence, there was no dispute as found by the learned trial judge that the appellant and the deceased used to operate in the same premises but worked for different companies. The learned judge also found that on that date there were only two people in the premises, the appellant and the deceased from 17:00 hours onwards, and that if the deceased had left the premises to go and buy dog food, he definitely had to return for work that night.

5.21 The finding by the learned judge that there were only two people in the premises that night has also been attacked by the defence. The appellant has argued that there could have been other people. However, those other persons are not known and it was never put to PW1 in cross-examination that there could have been other people on the business premises that night.

5.22 In view of the appellant's admission that he worked well and that there was no break-in during the night of 13th May 2012, we are inclined to agree with the trial judge that the appellant and the deceased were the only people on the business premises that night.

5.23 The fact that the deceased's body was found in the well in the morning of 14th May 2012 meant that he was at work that night

contrary to the appellant's statement to PW1 that he did not return after he was given the money to buy dog food. In fact, the appellant accepted in cross-examination that when he knocked off in the morning he talked to PW1 who asked him about the deceased since he was also working that night in the same yard. Thus, the trial judge cannot be faulted for finding that the appellant lied to PW1 that the deceased did not return to work.

5.24 We agree that an accused person may tell a lie for reasons consistent with his innocence and that failure by the appellant to repeat in court the explanations he gave to PW1 and PW3 would not inevitably amount to guilt. However, on the totality of the evidence, given that the appellant was the last person to be seen with the deceased and he had the opportunity to commit the offence, he lied to distance himself from the murder.

5.25 Further, as correctly submitted by Mrs. Lungu, considering the time the appellant was last seen with the deceased and the time the body was found in the well, the explanation given by the appellant to PW1 that the deceased had left and did not return could not be reasonably true. The trial judge was right to conclude that the fact that the appellant went to ask PW3 if she had seen the deceased was, a contradiction to the picture he

portrayed in court that he was indifferent as to whether or not the deceased was at work.

5.26 The postmortem report revealed that the deceased did not drown but died from head injuries which were inflicted on him to the forehead, nose, upper jaw, rib area, left hemisphere and right arm. Clearly, the above findings in the post mortem report corroborate the prosecution evidence that the deceased was assaulted and subsequently placed in the well. All the circumstantial evidence points to the appellant, particularly that the trial court accepted the appellant's evidence that there was no break-in on the night of 13th May 2012.

5.27 This, in our view, is significant because it indicates that the deceased was assaulted by someone with legitimate access to the premises, who in this case, was the appellant. Therefore, we reject the appellant's argument in ground 3 that any other person could have attacked the deceased or that he could have fallen into the well on his own because of an epileptic seizure and sustained the injuries revealed in the post mortem report.

5.28 Although no evidence was led that the deceased had no underlying health condition, the post mortem report did not allude to any epileptic condition and we cannot agree with the

appellant that PW6 and the pathologist who conducted the post mortem conveniently neglected to follow this lead or that had they done so, this would have exonerated the appellant.

5.29 Counsel for the appellant is merely speculating that the cause of death would have been established as most probably epileptic seizure. First, this issue was not raised in the cross-examination of PW6 and there was nothing that stopped the appellant who was represented by counsel at the trial from calling the pathologist for purposes of cross-examining him on his findings in the post mortem report.

5.30 This brings us to the issue of motive. We said earlier that the money the deceased was given to buy the dog food did not seem to have been the motive for the killing and the learned trial judge found that the appellant was the only one who had the opportunity of assaulting the deceased and damping him in the well for reasons that were not clear from the evidence.

5.31 The evidence of PW6 shows that when he interviewed the appellant, he admitted that he was the one who hit the deceased with a plank. However, after the defence objected to the admission of that piece of evidence on the ground that the appellant never made a statement and the State told the court

that they were not relying on any confession, the judge directed that the evidence relating to the confession would be ignored.

5.32 Nevertheless, in cross-examination, PW6 was compelled by the defence to disclose what the appellant had said to him when he was interviewed. Hence, PW6 revealed that the appellant said he had picked a quarrel with the deceased over an illicit local brew called *kachasu* and they started fighting. When he was overpowered, he picked a plank and used it to hit the deceased.

5.33 The view we take is that since this confession was brought into the evidence by the defence, there was nothing that precluded the trial judge from relying on that evidence. Our position is reinforced by the fact that, in mitigation of sentence, following the conviction, the learned defence counsel submitted that there were extenuating circumstances and urged the court to consider in its findings of fact that there were some arguments over beer and that it was possible the convict was intoxicated at the time, therefore his moral responsibility was diminished.

5.34 In rejecting that submission, the learned judge said it was not clear why the appellant assaulted the deceased because the prosecution did not rely on any confession statement and she did not find as the prosecution witness said that the two had

actually argued over *kachasu* and he consequently hit the deceased on the head with a plank.

5.35 We wish to point out that mitigating factors or mitigating evidence are facts that can be presented in a court of law in order to reduce or to decrease the severity or seriousness of a crime or the sentence or punishment issued if someone is found to be guilty. The trial judge can consider the various factors that may have influenced a person to commit a crime.

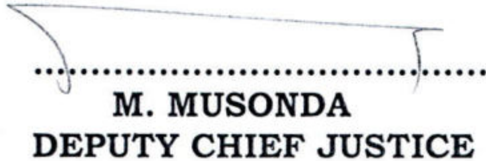
5.36 In the present case, the appellant was represented by counsel and he instructed his counsel to inform the court that he had actually argued with the deceased over *kachasu* and hit him on the head with a plank. This mitigation evidence was consistent with the confession given to PW6 which as we have said was let in by the appellant himself. The learned judge should not have rejected the confession and the mitigation evidence which actually brought out the motive for the assault.

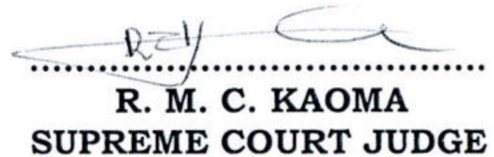
5.37 Anyhow, the trial judge properly found that the appellant had malice aforethought, considering the nature of the injuries inflicted on the deceased and the dumping of the body in the well. We concur with the trial judge that the totality of the

evidence against the appellant, led to the conclusion that there was no other reasonable hypothesis except that of guilt.

6. Conclusion

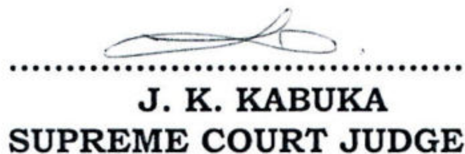
6.1 In the event, the appeal fails on all the three grounds of appeal and we dismiss it accordingly.





M. MUSONDA
DEPUTY CHIEF JUSTICE

R. M. C. KAOMA
SUPREME COURT JUDGE



J. K. KABUKA
SUPREME COURT JUDGE