

IN THE COURT OF APPEAL OF ZAMBIA

APP No. 17/2023

HOLDEN AT LUSAKA and NDOLA

(Criminal Jurisdiction)

BETWEEN

ABEL MUMBI KASONGO

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Muzenga and Chembe, JJA

ON: 16th January 2024 and 19th August 2024

For the Appellant: S. Lukwesa-Chibuye, Deputy-Director,
Legal Aid Board

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

J U D G M E N T

Mchenga DJP, delivered the judgment of the court

Cases referred to:

1. The People [1977] Z.R. 151
2. Mbinga Nyambe v. The People [2011] Z.R. 246
3. John Mpande v. The People [1977] Z.R. 440

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellant appeared before the High Court (Makubalo, J.), charged with the offence of murder contrary to **Section 200 of the Penal Code.**

1.2 He denied the charge and the matter proceeded to trial. At the end of the trial, he was convicted for committing the offence and condemned to suffer capital punishment.

1.3 He has appealed against the conviction.

2.0 CASE BEFORE THE TRIAL COURT

2.1 On the 20th of November 2016, around 19:00 hours, the appellant and two others, who were coming from a drink, boarded a canoe to cross the Kafue River, at Mufuchani, in Kitwe. The canoe was being paddled by Ntalasha Mumba.

2.2 Midstream, Ntalasha Mumba demanded that the appellant pay the full fare, but the appellant declined, indicating that he would pay when they reached the shore.

2.3 An argument arose between the two, after the

appellant splashed water on Ntalasha Mumba, who in return insulted the appellant.

2.4 The appellant moved from where he was seating, to where Ntalasha Mumba was and they manhandled each other. They both fell into the river at the same time.

2.5 About three to ten minutes later, the appellant was able to swim to where the boat was, and he was taken to the shore. But Ntalasha Mumba was nowhere to be seen.

2.6 Five days later, Ntalasha Mumba's body was retrieved from the river.

2.7 A post-mortem attributed his death to respiratory failure due to a broken sternum and 4 broken ribs. In court, the pathologist testified that the injuries suffered by Ntalasha Mumba were unusual for a person who died on the river. Pressed on the point, he said such injuries could be suffered in a fast flowing rocky river.

2.8 The trial Judge concluded that even though the evidence against the appellant was circumstantial, the only inference that could be drawn on it was that

the appellant caused the injuries that Ntalasha Mumba suffered.

2.9 Further, the trial Judge found that going by the nature of the injuries Ntalasha Mumba suffered, the appellant must have intended to cause him grievous harm. The appellant therefore had *malice aforethought* and he was found guilty of the charge of murder.

3.0 **GROUND OF APPEAL AND ARGUMENTS BY THE PARTIES**

3.1 The sole ground of appeal is that an inference that the appellant murdered Ntalasha Mumba, is not the only inference that could have been drawn on the evidence that was before the trial Judge.

3.2 The respondent does not support the conviction.

3.3 The position that the appellant and the respondents have taken is that had the trial Judge considered the other inferences that were plausible, she would not have come to the conclusion that the appellant murdered Ntalasha Mumba.

3.4 Mention was made of the fact that Ntalasha Mumba

could have died as a result of injuries caused by the fast flowing river or an attack by an animal as the river was crocodile and hippo infested.

- 3.5 They submitted a proper assessment of the evidence before her, would have led the trial Judge to a conclusion that the threshold set in the cases of **David Zulu v. The People¹** and **Mbinga Nyambe v. The People²**, for a conviction to be founded on circumstantial evidence, had been met.

4.0 CONSIDERATION OF APPEAL AND DECISION OF THE COURT

- 4.1 The pathologist's finding was that the injuries he observed on Ntalasha Mumba's body were caused by force being exerted on the chest. He also said he was not able to tell what kind of force had been exerted.
- 4.2 He went on to say that since the death occurred in the river, it was possible that a strong current could have caused such injury, if a person hit into something.
- 4.3 In this case, there was no evidence of there being a strong current at the point the appellant and Ntalasha Mumba fell into the river.


- 4.4 Neither is there evidence of Ntalasha Mumba suffering injuries consistent with an animal attack.
- 4.5 Consequently, we are satisfied that the trial Judge cannot be faulted for coming to the conclusion that the appellant caused the injuries that Ntalasha Mumba suffered. The proposition that Ntalasha Mumba's death could be attributed to either a strong current in the river or an attack by an animal, is not grounded on any evidence.
- 4.6 Just before the appellant attacked Ntalasha Mumba, he was in good health and puddling the canoe. He disappeared into the river during a fight with the appellant. The next time he was seen, he was dead and had suffered a broken sternum and broken ribs.
- 4.7 It is apparent that Ntalasha Mumba suffered the fatal injuries in the course of a fight. In the case of **John Mpande v. The People**³, it was held that where a death occurs in the course of a fight, the appropriate charge is one of manslaughter and not murder. It is our view that holding in that case, is applicable to this case.

4.8 Consequently, we set aside the appellant's conviction on a charge of murder and in its place, we convict him of the lesser offence of manslaughter contrary to **Section 199 of the Penal Code.**

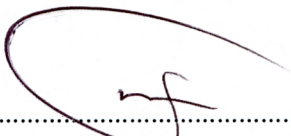
5.0 **VERDICT**

5.1 The appeal against conviction succeeds to the extent that the appellant's conviction for the offence of murder is set aside. In its place, we convict him for the lesser offence of manslaughter contrary to **Section 199 of manslaughter.**

5.2 We impose a sentence of 5 years imprisonment with hard labour, which sentence will run from 30th November 2016.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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



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Y. Chembe
COURT OF APPEAL JUDGE