

IT

**IN THE COURT OF APPEAL OF ZAMBIA      APPEAL NO. 89/2023**  
**HOLDEN AT LUSAKA**

*(Criminal Jurisdiction)*

**BETWEEN:**

**EVANS KAPEMBWA**

**AND**

**THE PEOPLE**



**APPELLANT**

**RESPONDENT**

**CORAM: MCHENGA, DJP, NGULUBE AND MUZENGA, JJA.**

***On 21<sup>st</sup> June, 2024 and 19<sup>th</sup> August, 2024.***

***For the Appellant:***      *Ms. M. Nzala - Senior Legal Aid Counsel, Legal Aid Board.*

***For the Respondent:***      *Ms. J. Banda – Senior State Advocate, National Prosecutions Authority*

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## **J U D G M E N T**

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**NGULUBE, JA** delivered the Judgment of the Court.

**Cases referred to:**

1. *David Zulu vs The People (1977) Z.R. 151*
2. *Dorothy Mutale & Richard Phiri vs The People (1977)*
3. *Nsofu vs The People (1973) Z.R. 287*
4. *Mulenga and another vs The People (2008) Z.R. 1*
5. *John Mkandawire and others vs The People (1973) Z.R. 100*
6. *Chimbini vs The People (1973) Z.R. 191*
7. *Fawaz and Prosper Chelelwa vs The People (1995) S.J,*

**Legislation referred to:**

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

**1.0 INTRODUCTION**

1.1 The appellant appeared before Zulu, J at Kasama High Court and was charged on an information containing one count of the offence of Murder contrary to **section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

1.2 The particulars were that Evans Kapembwa, on 11 February, 2022, at Mpulungu in the Mpulungu District of the Northern Province of the Republic of Zambia, murdered Martha Mulenga. He denied the charge and the matter proceeded to trial.

**2.0 CASE BEFORE THE TRIAL COURT**

2.1 The evidence before the trial court was that Mary Mwanza, PW1 was a friend to Martha Mulenga now deceased. She testified that in February, 2022, she was living at Nesha Guest House with the deceased.

2.2 On 11 February, 2022 at about 08:00 hours, Mary Mwanza went to the deceased's room and found the appellant sitting on the bed. She also noticed that her friend, Martha Mulenga appeared to be standing on the bed and was leaning towards the wall. PW1 then observed that there was a cord tied around

the deceased's neck which was hanging from the roof. She asked the appellant what was going on and he told her that the deceased was just drunk. She locked the appellant in the room because he wanted to run away and she went to call a person who was making furniture outside. They went back to the room and cut the cord that was around the deceased's neck.

2.3 They tried to resuscitate the deceased by pouring water on her but PW1 later realized that she was dead. She was in a state of confusion because of her friend's sudden death and she was later questioned by the police. Because of her state, she could not give a statement to the police and was detained for two days. PW1 stated that she did not witness any fight between the appellant and the deceased.

2.4 Detective Inspector Venus Kasangu took over a docket of murder on 11 February, 2022. This related to the murder of a woman at Nesha Guest House in Mpulungu. He detained PW1 because she was in a state of anguish as the deceased Mary Mulenga was her best friend. He charged and arrested the appellant for the murder of Mary Mulenga because he was the one who was in the deceased's room when she was found dead.

2.5 PW2 attended a postmortem examination that was conducted on the body of the deceased and the cause of death was found to be asphyxia due to strangulation. PW3, Dr. Mwinga

Namuyuni conducted a postmortem examination on the body of the deceased on 15 February, 2022 and his findings were that the cause of death was asphyxia due to strangulation. He further testified that the deceased was strangled and did not commit suicide.

2.6 Christopher Sikazwe, PW4 was the son of the owner of Nasha Lodge. He stated that on 11 February, 2022 at about 06:00 hours, he went to the deceased's room to collect rentals but she told him that she would give him the money later. He went back to the deceased's room after an hour and found her straggling with the appellant at the door. He informed PW4 that the deceased had seized his shoes. PW4 then went into the room and threw the shoes out of the room so that the appellant could have them back.

2.7 About twenty minutes later, he went to the room after PW1 called him to see what had happened. He found the appellant sitting on the floor, while the deceased was kneeling on the mattress with a cord hanging from the roof and tied around her neck. He got a knife and cut the cord and as he did so, the appellant told him that the deceased had gotten his money. He then reported the matter to the CCPU officers and later the matter was reported to the Police.

### **3.0 APPELLANT'S DEFENCE**

3.1 In his Defence, the appellant denied being with the deceased at Nesha Guest House and did not even know where it was situated. He however met the deceased and PW1 at a bar earlier on the fateful day and he gave PW1 K40 after she asked for some money. Thereafter, he went to watch football. He had known PW1 and the deceased for a few months prior to the incident because they used to purchase bus tickets from him. He had known PW4 for over twenty years.

3.2 DW2, Sharon Namwinga's testimony was that on 11 February, 2022, she went to Nesha Guest House where she found two gentlemen who told her that they had locked the deceased up in a room because she wanted to commit suicide. She went into the room and found her lying on the floor. A further check revealed that she was already dead and that she had a cord tied around her neck.

### **4.0 TRIAL COURT'S FINDINGS OF FACT**

4.1 The trial court found that there was overwhelming evidence pointing to the fact that the deceased's death was a homicide and not a suicide. The court found that the appellant was seen in the deceased's room by PW1 and PW4 and that by then, the deceased was hanging from the roof with a cord tied around her neck.

4.2 The court further found that PW1 was not a witness with a possible interest to serve and was only detained at the Police for two days because she was of no fixed abode in Mpulungu. The court found that she had no motive to give false evidence against the appellant.

4.3 The court found that PW4 was not a witness with a possible interest to serve and that he had no motive to falsely implicate the appellant. The trial court concluded from the circumstantial evidence that the appellant strangled the deceased to death as he had been in the room with her.

4.4 The court noted that as PW4 was cutting the cord that was around the deceased's neck, the appellant who was in the room merely stated that she had his money and he showed no concern for her welfare. The court found that the circumstantial evidence pointed at the appellant and he was convicted for the murder of the deceased. The trial court found no extenuating circumstances and sentenced the appellant to death.

## **5.0 THE APPEAL**

5.1 The appellant was dissatisfied with the conviction and sentence and appealed to this court, advancing one ground of appeal couched as follows-

**1. The learned trial Judge erred both in law and fact when he convicted the appellant on circumstantial evidence.**

## **6.0 APPELLANT'S HEADS OF ARGUMENT**

6.1 In arguing the sole ground of appeal, it was submitted that the evidence against the appellant was purely circumstantial as there was no evidence on record to prove that it was the appellant that caused the death of the deceased. It was argued that there was a possibility that the deceased died as a result of committing suicide and that this possibility did not take the case out of the realm of conjecture as was decided in the case of **David Zulu vs The People<sup>1</sup>**.

6.2 Counsel contended that an inference of suicide could not be ruled out especially that PW3 confirmed that in suicide cases, it is common to see fecal matter in the anus of the victim. It was submitted that there was fecal matter on the deceased after her body was found lying in the room.

6.3 The case of **Dorothy Mutale and Richard Phiri vs The People<sup>2</sup>** was cited, to further the argument that two or more inferences could have been drawn in this matter and that the court should have adopted the inference which was more favourable to the appellant as there was nothing in the case to

exclude the inference. The court was urged to allow the appeal and acquit the appellant as guilt was not the only inference that the court could have drawn from the circumstantial evidence at its disposal.

## **7.0 RESPONDENT'S HEADS OF ARGUMENT**

- 7.1 The respondent filed its heads of argument in response on 19 June, 2024. Responding to the sole ground of appeal, it was submitted that the State were in support of the appellant's conviction.
- 7.2 It was submitted that the circumstantial evidence in this matter was compelling and was so cogent that it lead to the court making an inference of guilt. It was contended that the appellant had the opportunity to commit the offence as he was found in the room where the deceased was as she hang from the roof with a cable around her neck. It was contended that the opportunity amounted to corroboration as it brought in the element of suspicion. The case of *Nsofu vs The People*<sup>3</sup> was referred to in this regard.
- 7.3 Counsel referred to the appellant's denial of having being found in the deceased's room by PW1 and PW4. It was argued that the appellant did not challenge the respective testimonies of



PW1 and PW4 because he was found in the deceased's room, as the body hang from the roof with a cable around the neck.

7.4 It was submitted that the evidence of PW3, the medical doctor who conducted the postmortem examination was that the deceased died of strangulation and that there was hemorrhage in the deceased's eyes to confirm that she died of strangulation. It was argued that the defence did not object to the production of the postmortem examination report, exhibit P1 which concluded that the deceased died of Asphyxia or strangulation. Accordingly to Counsel, the trial court was on firm ground when it relied on the postmortem examination. We were urged to dismiss the appeal.

## **8.0 THE HEARING**

8.1 At the hearing of the appeal, Counsel relied on the ground of appeal and heads of argument filed.

8.2 Regarding the evidence of DW2, whose testimony was that she was told by a Mr. Nsindano that the deceased wanted to commit suicide, it was submitted that this was hearsay as the said Mr. Nsindano was not called as a witness. It was argued that the only inference that can be drawn is that the appellant murdered the deceased. We were urged to dismiss the appeal and uphold the conviction and sentence.

## **9.0 DECISION OF THE COURT**

- 9.1 We have examined the evidence before us, the submissions by both Counsel and the Judgment appealed against. In the sole ground of appeal, the learned Counsel for the appellant contends that the evidence against the appellant was purely circumstantial and that there was no evidence linking the appellant to the death of the deceased.
- 9.2 Counsel contended that there was a possibility that the deceased committed suicide and that as such, the circumstantial evidence did not take the case out of the realm of conjecture to permit only an inference of guilt.
- 9.3 The Supreme Court has guided and restated the legal principles in circumstantial evidence in a number of cases. For a court to convict on circumstantial evidence, the facts of the case must be incompatible with the innocence of an accused person and they should not be capable of explanation other than that of the accused person's guilt.
- 9.4 In the case of **David Zulu vs The People**, the Supreme Court stated inter alia that-

***“...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 guilt.”***

9.5 In the case of ***Saidi Phiri vs The People***, the Supreme Court 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.”***

9.6 *In casu*, learned Counsel for the appellant contends that the circumstantial evidence in this case does not permit only one inference, that of the appellant’s guilt. It was contended that there is a possibility that the deceased committed suicide and that a witness, DW2 testified that she was told that the deceased in fact committed suicide.

9.7 According to Counsel, two or more inferences were possible in this matter and that the court should have adopted the inference which was more favourable to the appellant. Counsel contended that the inference of suicide was not ruled out.

9.8 On the other hand, the learned State Advocate submitted that the appellant had the opportunity to murder the deceased as he was found in the deceased’s room while she hang from the roof with a cable around her neck.

- 9.9 What we ascertain from the set of facts on the record is that the appellant was with the deceased on the fateful morning and that PW4 found the appellant and the deceased having an argument because the deceased had confiscated the appellant's shoes for failing to pay for sexual services that had been rendered to the appellant as the deceased was a sex worker. It was PW4's testimony that he got the shoes from the deceased and handed them back to the appellant. It was PW4's further testimony that when he went back to the deceased's room after about an hour, she was hanging on a cable which was tied to the rafters in the roof, dead, while the appellant sat on the bed unconcerned and wearing his shoes.
- 9.10 The postmortem examination report shows that the deceased died of strangulation. A perusal of the Judgment of the lower court reveals that the learned trial Judge analysed the evidence before the court and made findings of fact which were set out in the Judgment.
- 9.11 In ascertaining what caused the death of the deceased, the trial Judge accepted the findings of the doctor that the deceased died of strangulation. The lower court found that the appellant's behavior on the fateful morning was not consistent with the conduct of an innocent person as he attempted to run away when he was confronted by PW1 about the deceased's

condition. As PW4 cut the cord from the deceased's neck, the appellant stated that the deceased had hidden his money and he told PW1 and PW4 that she was merely drunk.

9.12 The lower court found that the circumstantial evidence had taken the case out of the realm of conjecture and that the only inference that could be drawn was the guilt of the appellant.

9.13 We are in agreement with the lower court that the appellant's behavior and the evidence he gave in his Defence, that he was not at Nesha Lodge on the fateful morning, is at variance with the evidence of PW1 and PW4.

9.14 We note that PW4 was an independent witness, who testified that he found the deceased and the appellant having an altercation over money that the appellant failed to pay the deceased. An hour later, PW4 went back to the deceased's room and the appellant was still in the room while the deceased hang from the rafters in the roof on a cable. When she was pulled down and laid on the floor, it was discovered that she was already dead. The doctor's findings as per the postmortem examination report were that the deceased died of asphyxia due to strangulation.

9.15 In our view, the set of facts highlighted above point at the appellant as the person who strangled the deceased to death.


He had the opportunity and motive as he stated that the deceased hid his money.

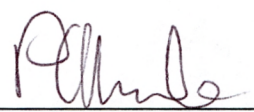
9.16 In our view, the only logical conclusion from the circumstantial evidence is that the appellant strangled the deceased to death and then hang her body on the cord that was tied to the rafters to fake suicide.

9.17 We are satisfied that the lower court was on firm ground when it convicted the appellant for the murder of the deceased. We find no merit in the sole ground of appeal and it fails. We are further in agreement with the lower court that there were no extenuating circumstances.

## **10.0 CONCLUSION**

10.1 The net result is that the appeal is dismissed. We uphold the conviction and sentence.

  
C. F. R. MCHENGA  
**DEPUTY JUDGE PRESIDENT**

  
P. C. M. NGULUBE  
**COURT OF APPEAL JUDGE**

  
K. MUZENGA  
**COURT OF APPEAL JUDGE**