**IN THE COURT OF APPEAL OF ZAMBIA** **APPEAL NO. 123/2023**
**HOLDEN AT LUSAKA**
(Criminal Jurisdiction)

BETWEEN:

**PATSON KABUNGO SICHONI** **APPELLANT**

AND


**THE PEOPLE** **RESPONDENT**

**CORAM: Mchenga, DJP, Muzenga and Chembe, JJA**
**On 14th October 2024 and 23rd December 2024**

For the Appellant: Ms. J. Lumamba-Hamaleke, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mrs. S. Mwamba-Besa, Senior State Advocate, National Prosecution Authority

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# J U D G M E N T

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

Cases referred to:

1. **Mwewa Murono v. The People (2004) ZR 207**
2. **Saluwema v. The People (1965) ZR 4**
3. **Chabala v. The People (1976) ZR 4**
4. **David Zulu vs The People (1977) ZR 151**
5. **Dorothy Mutale and Richard v. The People (1977) S.J. 51**
6. **John Mwansa and Samuel Mwansa v. The People – SCZ Appeal No. 170, 171 of 2014**
7. **Ilunga Kabala and John Masefu v. The People (1981) ZR 102**
8. **John Mwanaute v. The People – SCZ Appeal No. 200 of 2011**

9. **Jackson Kamanga and 4 Others v. The People – SCZ Appeal No. 30, 31, 32, 34/2020**
10. **Robson Chizike v. The People – CAZ Appeal No. 94 of 2020**
11. **Liswaniso v. The People (1976) ZR 277 (SC)**

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 convicted of murder, contrary to **Section 200 of the Penal Code Chapter 87 of the Laws of Zambia**, by Mbuzi, J and sentenced to life imprisonment.

1.2 The particulars of offence alleged that the appellant on the 15th day of July 2019 at Mongu, in the Mongu District of the Western Province of the Republic of Zambia, jointly and whilst acting together with other persons unknown did murder Joseph Kamungo.

## 2.0 PROSECUTION EVIDENCE

2.1 The prosecution case was that sometime in June 2019, the appellant left his village with his son Joseph Kamungo aged 14 (a child with albinism) for a place called Tapo. He returned to the village in the month of September 2019 alone. When he was asked by PW1 where his son was, he stated that he left him at a Mr. Kabemba's

village in Mongu, Sefula area, so that he could eat food there as there was hunger at his village (appellant's).

2.2 A report was subsequently made to the police to the effect that the appellant had murdered his son. Acting on the report, PW4 apprehended the appellant and detained him in police custody on 18th November 2019. In the same month, the appellant led PW4 and other officers to a place in Tapo area where they recovered a brown short and a green slipper which belonged to his son. The appellant also pointed to a place on the ground, where after digging, a stick and some suspected human bones were found. All these items were collected, of which the bones were left with Detective Inspector Mbeti and the other items were taken by PW4.

2.3 Detective Inspector Mbeti was never called to testify. The bones were subsequently submitted to the office of the State Forensic Pathologist to ascertain if they were human bones or not, and for age determination. A report was generated by Dr. Muchelengánga confirming that they were human bones but could not ascertain the age.

2.4 The bones which were recovered were, according to PW2, a bone of the lower jaw, another which looked like a rib and another bone which he could not know. They were three bones. The arresting

officer PW4, did not describe the bones but simply referred to them as bones. The bones examined by the pathologist were more than the ones recovered. Further, they were not subjected to DNA analysis.

2.5 The appellant was found with a case to answer and placed on his defence.

**3.0 DEFENCE EVIDENCE**

3.1 In his defence, the appellant admitted having gone with his son Joseph Kamungo in June 2019 to Tapo area. He however denied killing him. He stated that on the day when he left, he was in the company of other kids and some adults he named as Masiyaleti, Chibomba and Manyando. While at Tabo, the kids who were herding cattle with his son, informed him that his son had been killed by Masiyaleti, Chibomba and Manyando and they also directed him to a place where he would find his dead son. He went there and found a short belonging to his son and a stick under a tree.

3.2 He then left the area and returned to his village. He was subsequently apprehended and accused of murdering his son, which he denied but named the killers. He confirmed in cross examination that his son had been killed.

## 4.0 DECISION OF THE TRIAL COURT

4.1 The trial court found that the circumstantial evidence against the appellant was overwhelming and convicted him.

## 5.0 GROUNDS OF APPEAL

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

1) **The learned trial judge erred in law and in fact when the court below admitted evidence of a confession in the absence of conclusive evidence that it was given freely and voluntarily.**

2) **The learned trial judge erred both in law and fact when he convicted the appellant for the offence of murder based on circumstantial evidence which did not take the case out of the realm of conjecture to permit only an inference of guilt.**

## 6.0 APPELLANT'S ARGUMENTS

6.1 In support of ground one, the learned counsel for the appellant contended that the burden of proving every element of the offence charged lies with the prosecution and that the standard of proof must be beyond all reasonable doubt. We were referred to **Mwewa Murono v. The People[1] and Saluwema v. The People[2]** for this proposition. The case of **Chabala v. The People[3]** was also referred to where it was held that:

**"If the explanation is given, because guilty is a matter of inference, there cannot be a conviction <u>if the explanation might reasonably be true</u>, for then guilt is not the only inference. <u>It is not correct to say that the accused must give a satisfactory explanation"(underlined for emphasis).</u>**

6.2 It was contended that despite the testimony of PW4, Detective Chibwente Abija, that he received a report of murder from Malilo Njamba of Maboloka area that her grandson aged 14 years was murdered by the father together with Masialeti, Kuzango, Chimboma Sepiso Mooka and Manyando Lilayi using a stick, there was no eye witness to the murder and the source of that information was not disclosed.

6.3 Learned counsel for the appellant argued that the arresting officer gave evidence of leading, the trial court did not enquire from him if the leading was voluntary or if he had any objection to that evidence. This according to counsel was a misdirection, which the prosecution capitalised on in trying to sneak in a confession of this nature using the back door.

6.4 Counsel argued that the appellant gave a reasonable explanation which the court ignored that he was told, by the children he travelled with, that it was Chibomba and Manyando who committed the offence. It was counsel's argument that the failure by the police

to investigate this information was a dereliction of duty on their part, which dereliction should be resolved in the appellant's favour.

6.5 In the premises, we were urged to allow the appeal, quash the appellant's conviction, set aside the sentence and set him at liberty.

6.6 In support of ground 2, learned counsel for the appellant pointed us to the case of **David Zulu v. The People**[4] in contending that there was no eye witness to the murder of the deceased person, therefore the circumstantial evidence did not take the case out of the realm of conjecture so as to attain such a degree of cogency which should permit only an inference of guilt.

6.7 Learned counsel submitted that PW1 and PW2's evidence was to the effect that the appellant left his village with the deceased and PW2 was seeing the appellant for the first time about 5 metres away with his son and travelled back to his village alone without him. It was argued that it was possible that the deceased was killed by unknown people the week when the appellant was away and was only arrested on mere suspicion.

6.8 It was argued further that PW4 did not tell the court whether the appellant had confessed and the circumstances in which he led them to the crime scene. Counsel submitted that the evidence of PW2 was that when the appellant was leading the team to the scene of

the crime, he was not talking but crying. Counsel reiterated that the prosecution tried to get a confession using the back door and the court fell into grave error as it did not bother to inquire into whether the appellant gave a confession to the police before admitting to lead the police to the scene.

6.9 It was argued that the fact that the bones were discovered in the purported grave of the deceased while the body was alleged to have been discovered at a distance of one and half kilometres away from where the bones were found, makes it possible that the bones and body were not for the same person. It was contended that where there are other inferences which could be drawn, one more favourable to the accused must be drawn, as guided in **Dorothy Mutale and Richard Phiri v. The People.**[5]

6.10 We were urged to allow the appeal, set aside the conviction and acquit the appellant forthwith.

## 7.0 RESPONDENT'S ARGUMENTS

7.1 In response to ground one, learned counsel for the respondent contended that the trial court was on firm ground when it admitted evidence of leading on the basis that a verbal caution was given to the appellant prior to the leading, as indicated by the testimony of PW4 on page J8 lines 1 to 5.

7.2 It was argued that as a result of this leading, the deceased person's remains, clothing and slippers were discovered. Learned counsel for the respondent placed reliance on the case of **John Mwansa and Samuel Mwansa v. The People**[6] where the Supreme Court stated that it is a well-established principle that the leading of the police to the scene or elsewhere by an accused, whether voluntary or not, has resulted in the discovery of real evidence or discovery of anything else not already known to the police, the evidence of leading is always admissible.

7.3 We were urged to dismiss this ground as it is devoid of merit.

7.4 In relation to ground two, learned counsel for the respondent argued that the trial court was on firm ground when it convicted the appellant on the totality of the circumstantial evidence before.

7.5 It was submitted that the appellant's actions, his decision to leave for Tapo without notifying anyone including his wife, PW3 while in the company of the deceased, a minor and an albino was particularly of concern considering the prevalence of ritual killings targeting albinos in our society.

7.6 It was argued that these amounted to odd coincidences and suggested a premeditated intention to murder the deceased. Reliance was placed on **Ilunga Kabala and John Masefu v. The**

**People**[7] for the principle that, odd coincidences, if unexplained may be supporting evidence.

7.7 Learned counsel for the respondent further argued that the evidence of PW2 on page J8, lines 3 to 5 of the judgment to the effect that the appellant was in the company of the deceased for a period of 3 to 4 days in Tapo, shows that he was the last person to be seen with the deceased. It was submitted that the trial court's conclusion that the appellant was responsible for the death of the deceased was well-founded.

7.8 It was learned counsel's assertion that evidence placing an accused as the last person seen with the deceased constitutes corroborating evidence supporting the claim that the accused is responsible for the death of the deceased. Further reliance for this assertion was placed on the case of **John Mwanaute v. The People**[8] where the Supreme Court stated that:

> **"The totality of this circumstantial evidence which is that the appellant was the last person seen with the child before the child wound up dead in the bush, takes this case out of conjecture. This evidence came from PW3, the mother to the deceased, PW2 who saw the appellant with the child in the bush. This evidence, though circumstantial, is so cogent and strong such that it allowed the court below to draw only one reasonable inference and this is that the appellant is the one who murdered the child."**

7.9 It was contended that the totality of the circumstantial evidence which is that the appellant was the last person to be seen with the deceased before he was found dead is so cogent and strong such that it allowed the court below to draw only one reasonable inference which is that the appellant is the one who murdered the deceased.

7.10 We were urged to dismiss the appeal for being devoid of merit and uphold the conviction and sentence imposed on the appellant.

**8.0 THE HEARING**

8.1 At the hearing, learned counsel for the appellant and the respondent placed full reliance on their respective documents filed.

**9.0 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 grounds of appeal in the order in which they were argued.

9.2 In ground one, the appellant takes issue with the evidence of leading, having been allowed by the trial court without the appellant being asked whether it was voluntary or not. It was contended that it graced the record of the court through the back door. It is trite that evidence of leading stands on the same footing as a confession

and must be treated the same. In fact we have several times guided that evidence of leading amounts to a confession. The Apex Court and ourselves have guided in a number of cases that when such evidence is being given, the trial court has a duty to ask the accused person if it was voluntary, whether the accused person is represented or not (see the cases of **Jackson Kamanga and Four Others v. The People[9] and Robson Chizike v. The People[10]**).

9.3 We therefore have no hesitation in holding that the trial court fell into error when it allowed this evidence to grace the record of the court without complying with the guidance in the foregoing authorities. We therefore find merit in ground one. The matter does not end there, however. In this case, the leading by the appellant to the scene led to the recovery of a slipper, a short belonging to the deceased person and some human bones. The Supreme Court in the case of **Liswaniso v. The People[11]** held that:

> **"Apart from the rule of law relating to the admissibility of in voluntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an in admissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law)."**

9.4 In the circumstances, although the evidence of leading was not properly conducted, it led to the recovery of real evidence which is relevant to the case. On the guidance of the Supreme Court in the **Liswaniso case** *supra,* illegally obtained evidence is admissible and as such, this court cannot exclude it. On this score, we agree with the submission by learned counsel for the respondent.

9.5 We now turn to consider ground two. The contention by learned counsel for the appellant is that the circumstantial evidence herein is not sufficient to support the conviction. On the other hand, learned counsel for the respondent has with equal force argued that the circumstantial evidence is enough to support the appellant's conviction. We wish to firstly comment on the evidence of PW3, the spouse to the appellant. The law places restrictions on a spouse testifying against the husband or wife without their consent. This restriction is found in **Section 151 of the Criminal Procedure Code (CPC).** We note however that even if the deceased was not the biological child of PW3, the exception covers a child of either of them, therefore she could testify even without the consent of the appellant (see **Section 151(1)(c) of the CPC**).

9.6 Having said that, we turn to consider the circumstantial evidence herein. In this cause, suspected human bones were recovered by PW4, who handed them over to Detective Inspector Mbeti, who was never called to testify. The bones were subsequently submitted to the office of the State Forensic Pathologist to ascertain if they were human bones or not, and for age determination. A report was generated by Dr. Mucheleng'anga confirming that they were human bones but could not ascertain the age.

9.7 The bones which were recovered at the scene, according to PW2, were a bone of the lower jaw, another which looked like a rib and another bone which he could not know. They were three bones. The arresting officer PW4, did not describe the bones but simply referred to them as bones. The bones examined by the pathologist were more than the ones recovered. Further, they were not subjected to DNA analysis. In the circumstances, we hold the view that the pathologist's report on the bones should be excluded as no proper chain of custody of the bones was established, that is, who took or submitted the bones to the pathologist and how many exact bones were recovered, surrendered and examined. In short, it has

not been established if the bones which the pathologist examined, were the bones recovered by PW4.

9.8 Having excluded the report by the pathologist, we now consider the remainder of the circumstantial evidence. The appellant had gone with his son and confirmed that his son was killed by unknown persons, he returned to his village without his son and without telling anyone, including his wife PW3, neither did he report the death to the police. When asked about the whereabouts of his son by PW1, he lied that he had remained at a named village in Sefula Mongu. The appellant subsequently led to the recovery of a short and a green slipper belonging to the deceased and also a grave where suspected human bones were recovered.

9.9 It is trite that a conviction on circumstantial evidence is only tenable where the evidence is so strong that it can permit only an inference of guilt and that where the explanation by the accused can reasonably be true, the accused must be acquitted. In this case, the appellant left with his son and returned to his village alone. He knew his son had been killed but kept quiet and then led to the recovery of his son belongings and suspected human bones. We agree with the learned court below that this circumstantial evidence is cogent that it permits only an inference of guilt. The explanation

by the appellant is so unreasonable. How can a parent, knowing that his son has been killed keep quiet, pretend all is well and even lie about the whereabouts of the son.

9.10 We therefore cannot fault the trial court's finding in the circumstances. Ground two must equally fall.

**10.0 CONCLUSION**

10.1 Having found no merit in both grounds of appeal, we dismiss the appeal. The appellant's conviction and sentence are upheld.

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

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K. MUZENGA
**COURT OF APPEAL JUDGE**

.....
Y. CHEMBE
**COURT OF APPEAL JUDGE**