IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.48/19**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

ANDREW CHIBUTA **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 2nd June, 2020 and 14th August, 2020

For the Appellants : Mrs M. K. Liswaniso, Legal Aid Counsel

For the State : Mrs G. Kashishi-Ngulube, Principal State Advocate

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred:

1. **Miyutu & Another v The People, App.No.23/2016***(unreported)*
2. **Saluwema v The People (1965) ZR 4**
3. **Chansa v The People(1975) ZR 136**
4. **Kapembwa v Maimbolwa and Attorney General (1981) ZR 127**

The appellant was charged in the High Court at Kasama, presided over by Kabuka, J, (as she then was), with one count of murder. He was convicted of the offence and sentenced to death. He now appeals on the solitary ground that the court below erred in law and fact when it rejected his explanation that the death of the deceased was by accident.

The case against the appellant was this:

On 3rd February, 2009, at a village in Luwingu in the morning, the appellant's mother, Dorothy Mwaba (PW1) was entrusted with the custody of two young children of the appellant's elder brother, Julius Chibuta (PW2). PW1 put the two children by a fire in an outside shelter within the yard. She went to attend to her field which was just at the edge of the homestead. At some point, one of the two children appeared at the edge of the field. PW1 took the child back to the shelter, only to find the other child lying down, with visible injuries, while her son, the appellant, was standing over the child, wielding an axe. PW1 shouted for help, whereupon members of the village mobilized themselves, tied up the appellant and handed him over to the police.

The postmortem examination that was conducted on the child revealed that the child had died of massive hemorrhaging due to ruptured neck vessels. The details of the injuries were reported to be as follows: There was a deep cut on the right side of the neck, with visible ruptured vessels: There was another deep cut on the left forearm.

The appellant told the court that the injuries on the child were caused by accident. He explained the accident thus: On the fateful morning, he woke up. He first drank some Kachasu beer that he had left over from the drinking bout that he had had with his friends the previous day. He then carried an axe on his shoulder and set off for his field. Since he had taken some beer, he was not very stable on his feet. As he passed where the children were, he tripped on a small log that lay in his path and fell, together with the axe, on the child. As a result, the axe inflicted the injuries on the child.

The trial judge considered the explanation. She noted the inconsistent versions of the explanation that the appellant gave during cross-examination. The judge also examined the description of the injuries in the medical report and held the view that they

could only have been caused by the striking of the axe, and not by its mere falling. She, therefore, disbelieved the appellant's story and convicted him of murder.

Mrs. Liswaniso, for the appellant, submits that the appellant's explanation was reasonably possible as it was backed by lack of motive for the murder on the appellant's part. She insists that the appellant did not shift positions in his explanation, and describes the apparent inconsistencies in the explanation as only minor deviations. Counsel takes issue with the learned trial judge's interpretation of the description of the injuries in the medical report. She argues that the medical findings, in themselves, did not rule out an accident because they lacked detailed information that would exclude any inference other than that the injuries were inflicted by hacking or chopping. Counsel submits that, instead of engaging in interpretation of the injuries, the trial judge should rather have called the pathologist who prepared the report to explain them. She relies on our decision in **Miyutu & Another v The People**[1],for this submission. Otherwise, it is counsel's submission that the appellant's explanation was reasonably possible and should have entitled him to an acquittal. Reliance is

placed on the case of **Saluwema v The People**[2] for this submission. We are urged to allow the appeal.

On behalf of the prosecution, Mrs. Kashishi-Ngulube insists that the appellant gave different versions of his explanation; and that these were not mere minor deviations. Counsel also submits that the terms in the medical report were neither ambiguous nor complicated, so as to require explanation by the Pathologist. She points out that the injuries described in the medical report showed that they were on two different sides of the body; and that this is what led the trial judge to say that the appellant's explanation was at variance with the medical report.

We were urged to dismiss the appeal.

We shall first dispose of the submission that the pathologist should have been called to explain, in detail, the injuries described in the medical report. In **Chansa v The People**[3] we held:

> **"When an expert gives evidence, it is the duty of the court to come to a finding and the expert's evidence is merely there to assist the court in coming to its conclusion".**

In the instant case, it was the duty of the trial judge to make a finding whether the injuries on the child were as a result of an

accidental fall on the part of the appellant or by his deliberate striking of the child with the axe. To do that, the judge was not being called upon to draw her conclusion from the medical report only. The conclusion was to be drawn from the totality of the evidence, the medical report being only one piece of that evidence. Hence the judge was to consider the testimony from the prosecution witnesses, the appellant's testimony and the Pathologist's medical report. The calling of the pathologist to come and explain the cause of the injuries, as submitted by the appellant, would still not have conclusively resolved the issue because his views would only have been hypothetical, and not factual. Hence the trial judge was on firm ground to consider the evidence in totality.

Coming to the trial judge's rejection of the appellant's explanation, this involved the making of a finding of fact: In this case, the judge weighed the evidence before her and made a finding that the injuries on the child were inflicted by the striking of an axe. We have, in quite a few cases, said that an appellate court should be slow to interfere with a finding of fact made by a trial court. In one such case, **Kapembwa v Maimbolwa and Attorney General**[4],

we held:

> **"(iv) The appellate court would be slow to interfere with a finding of fact made by a trial court, which has the opportunity and advantage of seeing and hearing the witnesses, but in discounting such evidence the following principles should be followed: That;**
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> **(a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he did accept; or**
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> **(b) In assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or**
>
> **(c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
>
> **(d) In so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."**

In this case, the trial judge had before her testimony from the prosecution that the appellant was found standing over the body of the child, holding an axe in his hands; the judge had also a medical report which showed that the injuries on the child were on both sides of the body; the judge also considered the constantly changing accounts by the appellant as to how he tripped and fell on the child.

After weighing all these, she made the finding that the child was struck with the axe. We do not see how this finding could be said to have been made under any of the circumstances which permits an appellate court to interfere with a finding of fact. Accordingly, we cannot interfere with that finding.

In the circumstances, the trial judge was on firm ground when she rejected the appellant's explanation. We find no merit in this appeal. We dismiss it.

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE