

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 121/2020

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

DALIO TEMBO

APPELLANT

AND

THE PEOPLE

RESPONDENT

CORAM: CHASHI, LENGALENGA AND NGULUBE, JJA.
On 25th March, 2021 and 1st April, 2021.

For the Appellant: E. I. Banda, Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: C. A. Bauleni, State Advocate, National Prosecution Authority

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Tepeb vs R* (1952) A.C.48
2. *Yokoniya Mwale vs The People*, S.C.Z. Appeal Number 285 of 2014
3. *David Zulu vs The People* (1977) Z.R.151
4. *Haonga vs The People* (1976) Z.R.200
5. *Mwewa Muroso vs The People* (2004) Z.R. 207
6. *Kalonga vs The People* (1976) Z.R.124
7. *Bwanausi vs The People* (1976) Z.R.103

8. *Dorothy Mutale and another vs The People* (1997) SJ 51
9. *Donald Fumbelo vs The People*, S.C.Z. Appeal Number 476/2015
10. *George Musupi vs The People* (1978) Z.R. 271
11. *Elias Kunda vs The People* (1980) Z.R.100
12. *Muvuma Kambanga Situna vs The People* (1982) Z.R.115
13. *Madubula vs The People*, S.C.Z Judgment Number 11 of 1994

Legislation referred to:

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

INTRODUCTION

1. The appellant was tried and convicted by Chitabo J on 12th December 2019, on a charge of murder contrary to Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.
2. The particulars allege that the appellant, on an unknown date but between 3rd April, 2019 and 7th April, 2019, at Chipata in the Chipata District of the Eastern Province of the Republic of Zambia murdered Baison Trivalio Phiri. He was sentenced to death and now appeals against both conviction and sentence.

EVIDENCE BEFORE THE LOWER COURT

3. The prosecution called seven witnesses in support of their case. PW1, Saindani Phiri was the deceased's son while PW2, Mavis Chibwe was the deceased's wife, PW3 Francis Soko was a

villager who lived in the same village as the deceased, PW4, Lusico Chulu was the deceased's son-in-law, PW5, Tobias Zimba was the deceased's brother, PW6, Maxiential Phiri was the appellant's brother and PW7 Detective Chief Inspector Laurie Musonda was the arresting officer. The appellant gave evidence on oath in his defence.

4. The evidence of PW1, Saindani Phiri was that, sometime in 2018, his father fell ill as his legs and stomach were swollen. He was taken to Katambo clinic for treatment but his condition did not improve. In April, 2019, PW1 and his mother, PW2, Mavis Chibwe took the deceased to the appellant who was a witchdoctor, for treatment. They paid an initial amount of K200.00 and after consultation, were charged an additional K3,500.00 as the appellant stated that he could send the disease that Baison was inflicted with back to the person who was bewitching him and in turn, he would recover. The appellant was paid in kind, by giving him a cow.
5. PW1 stated that after the appellant treated his father, he did not recover and the family decided to return to the witchdoctor and collect the cow that was given to him since he failed to deliver.

PW1, his mother, PW2 and the deceased went to visit the appellant at his home on a Sunday and he told them to see him the following Wednesday. On the appointed day, PW1's father went to see the appellant alone but that evening, he did not return home.

6. The following day, PW1 and his brothers went to see the appellant to inquire about the whereabouts of their father. He told PW1 that his father had been to see him the day before, but that he was in a disturbed state and left the appellant's home running. He requested PW1 to take his father's clothes to him so that he could use his powers to trace his whereabouts. PW1 later reported the matter to the village headman who instructed him and other villagers to go back to the appellant and demand to know where Baison went.
7. They saw the appellant and he was told to lead PW1 and other villagers to where he took PW1's father and he obliged, and led them from his house to a place that was about eight hundred metres away where they found some blood. They followed a trail which appeared as if someone was dragging something and eventually got to a place where they found a heap of branches

from a tree that was cut. They were told that this was where PW1's father's body was and some people were sent to call police officers at the local police station. When they arrived, the officers instructed the villagers to remove the branches and see what was beneath the heap.

8. The villagers dug out what was buried in the ground, the same being the body of PW1's father which was decapitated. The police officers asked the appellant where he put the head and he led them to a place within his farm where PW1's father's head was buried.
9. PW2, Mavis Chibwe testified that she and her son, PW1 took her husband for treatment to the appellant who was a witchdoctor as he was unwell. They paid him in kind and gave the appellant a cow. When he failed to deliver and heal her husband, the family went back to see the appellant with a view to retrieving the cow that was given to him. He told them to go back on another day and her husband went to see the appellant alone on a wednesday but did not return home. A search was later conducted and PW2 was informed that her husband was found

dead. She denied ever seeing the appellant at her house performing rituals when her husband was alive.

10. The evidence of PW3 was that on 7th April, 2019, he was informed by Chief Lazaro Tembo that Baison, PW2's husband had gone missing. He and six other people from the village went to conduct a search for the missing man and took some dogs with them. PW3 stated that they went into the bush where the dogs discovered a trail of blood and led them to where the body was. PW3 left the scene and went to call the police and when he returned, he found that the appellant had been apprehended by the villagers and had his hands tied. The police officers asked the appellant where the head of the deceased was and he then led the police to a place, about eighty metres from where the body was unearthed and the deceased's head was found, buried in a bag. This was within the appellant's farm.
11. PW4, Lusico Chulu's testimony was that he was in the search party that went to the appellant's village to look for his father-in-law Baison who had gone missing. He and other villagers apprehended the appellant and tied his hands and legs. The appellant then requested that he be untied so that he could

show the people how he moved with the said Baison. He was untied and he led PW4 and others to where he buried the deceased. When the Police arrived, the appellant led them to where the deceased's head was found, buried in the ground and contained in a bag. PW4 identified the head to be that of his father-in-law. He also saw the deceased's clothes in the bag. The appellant was not beaten when he was apprehended as only his hands and legs were tied.

12. PW5, Tobias Zimba, was the deceased's brother. He went to the appellant's farm on 7th April, 2019 as the body of his brother Baison who was reported missing a day earlier had been found. PW5 stated that the appellant led them to the place where his brother's decapitated body was found and he later led them to where he had buried the deceased's head. PW5 also stated that the bag contained the deceased's clothes.
13. PW6, Maxiential Phiri, the appellant's brother's testimony was that on 3rd April, 2019, Baison Phiri went to his house and told PW6 that he needed to see the appellant over a dispute relating to a cow that was given to the appellant. Baison proceeded to the appellant's house and stayed there for sometime. PW6 later

saw the appellant and Baison leave the house and he noticed that Baison carried an axe. PW6 stated that the appellant returned home alone at about 17:00 hours. The deceased's children went to the appellant's house at about 23:00 hours to inquire where their father was. The appellant told them to go back home and return the following day. PW6 stated that the deceased's body was subsequently found within the appellant's farm, five minutes away from his house. PW6 went on to state that when the appellant was apprehended, he was not beaten. He further stated that the appellant led the Police to where the body was found.

14. PW7, Detective Chief Inspector Lourie Musonda's testimony was that while he was on duty at Chipata Police station on 7th April, 2019, he received a report to the effect that a body of a man was found in Mwami area. He and other police officers went to the appellant's farm to a place where villagers suspected that a body was buried. He verbally warned and cautioned the appellant who accepted having taken part in burying the deceased's body. He was shown the site and asked some villagers that were present to dig up the grave.

15. They found an adult male person's body which had no head and it was identified by PW5 as being that of Baison Phiri. Soon thereafter, the appellant led PW7 and other police officers to the place where he buried the deceased's head. When they got there, the appellant removed the branches that covered the place and retrieved a bag which contained a head of a human being which PW5 identified as being that of Baison Phiri. PW7 later recovered an axe from the appellant's house which was allegedly used in the killing of the deceased. The family of the deceased were advised to bury the body in a shallow grave as it was in a decomposed state and the bag that contained the head was buried with the body.
16. In his defence, the appellant testified that he was a traditional doctor. He stated that he treated the deceased, Baison Phiri in March, 2019 as he had a swollen tummy and he was healed. He was later invited to perform rituals in order to remove evil spirits at the deceased's house and a few days later, he was informed that Baison had gone missing. Subsequently, some villagers went to his house and beat him up as they suspected that he was the one who killed Baison.

17. According to the appellant, the sons of Yohane rescued him from the angry villagers and took him to where the body of the deceased was found. At the scene, the angry villagers forced him to admit that he led the police to the recovery of the body and the head of the deceased. He however denied knowing anything about the death of Baison Phiri. According to the appellant, the deceased's body was found in the bush and not on his farm as alleged by the prosecution witnesses.
18. The appellant went on to state that he and his brother PW6 (Maxiential) were not on good terms as they had different fathers. The dogs were the ones which led people to the recovery of the deceased's head. The appellant stated that the police beat him up severely so that he could admit that he killed the deceased.
19. In his judgment, the learned trial Judge opined that the evidence against the appellant was circumstantial and proceeded to warn himself on the dangers of convicting on circumstantial evidence. The court referred to the case of ***Tepeb vs R¹*** in which it was held that prior to drawing an inference on an accused person's guilt on circumstantial evidence, the court

must be sure that there are no co-existing circumstances which would weaken or destroy the inference.

20. The court was also alive to the fact that PW1 and PW2, being the son and the wife of the deceased may have had a possible interest of their own to serve but ruled out the possibility. The court referred to the case of ***Yokoniya Mwale vs The People***² in which the Supreme Court guided that-

“. . . A conviction will be safe if it is based on the uncorroborated evidence of witnesses who are friends or relatives of the deceased or victim, provided the court satisfies itself that on the evidence before it, those witnesses could not be said to have had a bias or motive to falsely implicate the accused, or any other interest of their own to serve. What is key in our view is for the court to satisfy itself that there is no danger in the implication “or bias.”

The learned Judge held that the evidence of PW1 and PW2 was credible because the accused confirmed that they had taken the deceased to him for treatment and that they paid him in kind by giving him a cow. The court concluded that PW1 and PW2 were credible witnesses and accepted the evidence of PW6, the appellant's brother who stated that he saw the deceased on 3rd April, 2019 and even had a discussion with him over the cow

that he wanted to retrieve from the appellant. The court further accepted the evidence of PW6 that he saw the appellant and the deceased leave the appellant's home together, with the appellant returning alone at about 17:00 hours.

21. The court found that the evidence of PW6 corroborated that of PW1 and PW2, that on 3rd April, 2019, the deceased went to see the appellant at his home to retrieve the cow that he paid him as he had not recovered from the illness. The court found that the appellant did not provide a sufficient alibi as he merely stated that he was playing soccer on the day that the deceased went missing without any other details.
22. The court also accepted the evidence of PW6 that the appellant was tied up when he was apprehended but was not beaten before the deceased's body was found. After analyzing the evidence before it, the court found that the appellant led the Police to where the body of the deceased was after the mob was chased and stood at a distance.
23. The court opined that it was an odd coincidence that the deceased's body was found eight hundred metres from the appellant's house and that the axe which the deceased carried

on the day he disappeared was found in the appellant's house. The court concluded, from the evidence of PW6 that the appellant was the last person who was seen with the deceased before he disappeared and his body was later found buried at the appellant's farm. The court was of the view that the circumstantial evidence had taken the case out of the realm of conjecture to permit an inference of guilt on the part of the appellant. The court convicted the appellant for the murder of Baison Phiri and sentenced him to death.

THE GROUNDS OF APPEAL

24. Dissatisfied with the decision of the court, the appellant lodged this appeal advancing two grounds couched as follows-

1. ***The learned Judge misdirected himself in law and fact when he rejected the appellant's explanation as it could reasonably be true since the evidence before him was circumstantial.***
2. ***The learned Judge fell in grave error when he failed to consider the reasonable explanation of the appellant thereby shifting the burden of proof on the appellant.***

APPELLANT'S ARGUMENTS

25. In arguing ground one, Counsel contended that the prosecution could not have been said to have established the guilt of the

appellant as the circumstantial evidence did not satisfy the test set in the case of **David Zulu vs The People**³. According to Counsel, the evidence against the appellant was speculative as he was convicted merely because he was the last person that was seen with the deceased. Counsel argued that the totality of the evidence and the circumstances surrounding how the appellant was apprehended did not take the case out of the realm of conjecture, making the conviction unsafe.

26. It was contended that there was conflicting evidence from the prosecution regarding how the body was discovered and argued that PW3 stated that the body was found after the dogs led the people to where it was while the evidence of PW4 was that the appellant led the people to where the deceased's body and head were found. It was submitted that the court misapplied the principle in the case of **Yokoniya Mwale vs The People (supra)**.
27. According to Counsel, PW4 lied on material aspects of his evidence and she then referred to the case of **Haonga vs The People**⁴. It was argued that PW4 lied regarding the appellant's leading the Police to the recovery of the body of the deceased and that the truth could be as the appellant explained, that he

was beaten by the mob before the Police arrived. We were urged to find merit in ground one.

28. Turning to ground two, Counsel submitted that the appellant's conviction was unsafe because the prosecution had not discharged its legal burden. The court was referred to the case of *Mwewa Muroño vs The People*⁵, in which the Supreme Court guided that-

“. . . the legal burden of proving every element of the offence charged and consequently the guilt of the accused lies from beginning to end on the prosecution. The standard of proof is high.”

According to Counsel, the evidence in its totality and having regard to the burden of proof required in criminal law, the prosecution did not prove its case beyond all reasonable doubt. It was submitted that the evidence of the appellant remained unchanged and he stuck to his story regarding what transpired after the body was discovered.

29. Our attention was drawn to the case of *Kalonga vs The People*⁶ where the court stated that-

“An explanation which might reasonably be true entitles an accused to an acquittal. Even if the court does not believe it, an accused is not required to satisfy the court

as to his inconvenience but simply to raise a reasonable doubt as to his guilt.”

According to Counsel, it is probable that there are other inferences that can be arrived at other than the fact that the appellant murdered the deceased. Counsel went on to refer to the cases of ***Bwanausi vs The People***⁷ and ***Dorothy Mutale and others vs The People***⁸ and urged the court to believe the appellant's explanations in his defence as there is nothing in this case that warrants the exclusion of an inference that is in favour of the appellant. We were urged to allow the appeal and set the appellant at liberty.

RESPONDENT'S ARGUMENTS

30. The respondent filed heads of argument in response on 25th March, 2021. Counsel submitted that she would respond to the two grounds of appeal together as they are interrelated. It was argued that the evidence of PW1 and PW2, was to the effect that the deceased left home on the material day to see the appellant for the purposes of claiming his cow as he was of the view that the appellant failed to treat him. Counsel submitted that this evidence was corroborated by the evidence of PW6, the

appellant's brother who stated that he saw the appellant and the deceased leave the appellant's house and that they both carried bags with the deceased carrying an axe. This was the last time that the deceased was seen alive. It was contended that the appellant did not challenge this evidence, thereby confirming that the deceased went to his house on the material day.

31. Counsel argued that the totality of the circumstantial evidence is that the appellant was the last person who was seen with the deceased before he went missing and was later found dead and buried in the appellant's farm and that this takes the case out of the realm of conjecture as the appellant, on the fact of having been with the deceased had the opportunity to murder him.
32. It was further argued that the odd coincidence was that the deceased was found dead and buried on the appellant's farm and that the appellant then led the police to where the deceased's head was found. Further, that although the appellant stated that he was beaten by the mob and shown where to point before the police arrived, the evidence of leading

to the recovery of the head is admissible as it is coupled with strong circumstantial evidence.

33. It is submitted that the evidence of PW3 and PW4 is that the appellant led the police to the place where the deceased's head was buried. This was corroborated by the evidence of PW7 who stated that the appellant led him and other police officers to the place where the head was buried. Counsel referred to the case of **Donald Fumbelo vs The People**⁹ where the Supreme Court held that-

“When an accused person raises his own version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and therefore less weight will be attached to such version.”

It is submitted that the appellant did not raise the issue of being beaten until he gave his defence.

34. On the misapplication of the case of **Yokoniya Mwale vs The People (supra)**, counsel submitted that the court analysed the evidence of the individual witnesses and was of the view that the evidence of PW1 and PW2 was corroborated by the evidence of PW6, and that the circumstantial evidence had taken the case out of the realm of conjecture such that it attained such a degree of

cogency which permitted only an inference of the appellant's guilt.

35. It was submitted that the trial court was on firm ground when it convicted the appellant and sentenced him to death. We were urged to uphold the conviction and sentence and accordingly dismiss the appeal as it lacked merit.
36. At the hearing, both counsel relied on their heads of argument. The respondent's counsel also made oral submissions which reaffirmed the contents of the written submissions.

DECISION OF THIS COURT

37. We have considered the record of appeal and the arguments by counsel for the parties. The main issue for our consideration in this appeal is whether the learned trial Judge was on firm ground when he convicted the appellant on the circumstantial evidence before the court and whether he erred when he rejected the appellant's explanation on his version of what transpired in casu.
38. It is common cause that PW1 and PW2 who were the deceased's biological son and wife, respectively testified that on the material day, the deceased left home to go and see the appellant

to collect his cow that he had paid for traditional healing which did not materialise. The court was alive to the fact that being relatives of the deceased, the two witnesses could have had a possible interest of their own to serve.

39. The question of the treatment of witnesses with a possible interest to serve is a well settled question. The Supreme Court has on many occasions guided that courts should not lose sight of the real issue. In the case of **George Musupi vs The People**¹⁰ the Supreme Court stated that-

***“The tendency to use the expression witness with a possible interest to serve carries with it the danger of losing sight of the real issue. The critical consideration is not whether the witness does in fact have interest of a purpose of his own to serve, but whether he is a witness who because of the category in which he falls or because of the particular circumstances of the case may have a motive to give false evidence.*”**

40. The learned trial Judge was alive to the fact that these were witnesses with a possible interest to serve but found the evidence of PW1 and PW2 to be credible as the court stated that the appellant confirmed that they took the deceased to him for treatment. The court went on to find that the evidence of PW6

corroborated that of PW1 and PW2, that the deceased went to the appellant's house to collect his cow.

41. The appellant's Counsel criticized the lower court and stated that the case of Yokoniya Mwale was misapplied as the court did not analyse the evidence of the individual witnesses. We have carefully examined this argument in the circumstances of the case. In the case of ***Elias Kunda vs The People***¹¹, the court held that-

"A Judgment of a trial court can only be challenged on the basis that the evidence relied upon could not reasonably have been held to be credible."

42. Further, in the case of ***Muvuma Kambanga Situna vs The People***¹², the Supreme Court held that-

"The Judgment of the trial court must show on its face that adequate consideration has been given to all relevant material that has been placed before it, otherwise an acquittal may result where it is not merited."

43. Contrary to the Learned Counsel for the appellant's submission, we are of the view that the lower court's analysis of the evidence before it was proper and satisfactory. For example, the evidence of PW3 and PW4, as per the lower court's finding of fact is that

the appellant led the police to where the head of the deceased was buried after the body had already been found. The court also found that the evidence of the arresting officer, PW7 was that the appellant led the police to the place where the head was found.

44. We note that the evidence of PW4 differed from that of PW3 regarding the appellant's leading to where the deceased's body was found. PW4 stated that the appellant led the mob to the place where the body and the head were found while PW3 stated that the appellant only led the people to the place where the head was found. We further note that the court's finding of fact was that the appellant led to the place where the deceased's body was found with PW7 corroborating the evidence of PW3 and PW4 in this regard. The court went on to find that when the appellant led the police to the place where the head was found, the mob stood at a distance.

45. As was held in the case of *Madubula vs The People*¹³ that-

“Minor discrepancies in the prosecution's evidence that do not go to the root of the case are not fatal to the prosecution's case”

We therefore do not find the inconsistency in the evidence of PW4, that the appellant led to the places where the body and the head were found fatal to the prosecution's case. What supports the case for the prosecution is the evidence of PW6, the appellant's brother who saw him leave with the deceased and returned alone hours later as this circumstantial evidence is, in our view, an odd coincidence.

46. We form the view that the discrepancy in the evidence of PW4, that the appellant led to the place where the body was found was insignificant as PW3 and PW7 stated that the appellant led the police to where the head was found. We are of the view that no doubt was raised in the evidence of the prosecution and that the discrepancy cannot work against the veracity of the core of the testimony provided by the seven prosecution witnesses. We do not find merit in the first ground of appeal and it fails.
47. Regarding the second ground of appeal, that the court shifted the burden of proof by failing to consider the appellant's reasonable explanation, we are of the view that the court did in fact consider the appellant's defence when it analysed the totality of the evidence but came to the conclusion that the only

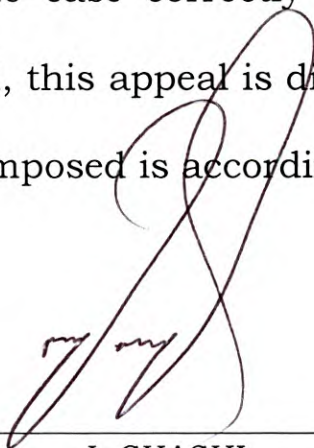
inference that could be drawn was the guilt of the appellant. The question is - how did the appellant lead the police to where the head was buried if he knew nothing about the deceased's death?

48. The trial Judge rejected the evidence of the appellant that he was forced to lead the mob to the place where the deceased's body was found. We have considered the principles highlighted in the case of **David Zulu vs The People** and we are satisfied that the circumstantial evidence took this case out of the realm of conjecture and allowed the lower court to draw an inference of guilt. We cannot fault the lower court for drawing such inference. We form the view that in dismissing the appellant's defence, the trial court adequately considered the evidence of the prosecution witnesses in detail and arrived at the conclusion that they were credible and reliable witnesses.
49. The circumstantial evidence was cogent and took the case out of the realm of conjecture to permit only an inference of guilt. Ground two of the appeal accordingly fails. As regards the inference that could be drawn on the evidence, we are of the considered view that the strands of circumstantial evidence

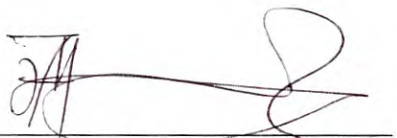
highlighted above culminate into cogent evidence that permitted only an inference of guilt. The test prescribed in the Dorothy Mutale case has been satisfied and the lower court was on firm ground when it convicted the appellant as charged. The appellant had the opportunity of murdering the deceased.

CONCLUSION

50. On the totality of the evidence, we form the view that the trial court dealt with the case correctly and the two grounds of appeal having failed, this appeal is dismissed for lack of merit. The death penalty imposed is accordingly upheld.



J. CHASHI
COURT OF APPEAL JUDGE



F.M. LENGALENGA
COURT OF APPEAL JUDGE



P.C.M. NGULUBE
COURT OF APPEAL JUDGE