

IN THE COURT OF APPEAL FOR ZAMBIA

Appeal No. 68/2020

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN :

MAXWELL KAFWALA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM : Kondolo, Chishimba and Sichinga, JJA
On 21st July, 2020 and 18th November, 2020

For the Appellant : Mr. K. Tembo Legal Aid Counsel from Legal Aid Board.

For the Respondent : Ms. J. Banda, State Advocate; National Prosecution Authority.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Charles Lukolongo v The People (1987) ZR**
2. **Chimbini Vs The People (1973) ZR**
3. **Saidi Banda v The People SCZ Judgment No. 30 of 2015**
4. **Bwanausi v The People (1976) ZR 106**
5. **Phillip Mungala v The People SCZ Judgment No. 9 of 2013**
6. **Machipisha Kombe v The People (2009) ZR 282**
7. **Pathias Siame and Paul Nkosi v The People SCZ Appeal No. 165/166/167 of 2013**
8. **Peter Yotum Hamende v The People (1977)**
9. **David Zulu v The People**

LEGISLATION AND OTHER WORKS REFERRED TO:



1. Section 129 of the Corporate Insolvency Act No. 9 of 2019

1.0 INTRODUCTION

1.1 The appellant was convicted by the High Court on a count of murder contrary to **Section 200 of the Penal Code, Chapter 87 of the laws of Zambia**. He was sentenced to 35 years imprisonment with hard labour.

1.2 The particulars being that between the 24th and 25th of March 2018 at Luanshya, in the Luanshya District of the Zambia, Maxwell Kafwala did murder Miriam Chisanga.

2.0 EVIDENCE ADDUCED IN THE COURT BELOW

2.1 PW1, a sister in law to the deceased testified that the accused and his wife had quarreled over her continued association with Susan, another sister in law, on account of her bad behavior. The deceased refused to heed the advice of her husband and threatened to go back to her parents' home in Masaiti area.

2.2 On the material date, the couple retired to their house for the night which was about 26 meters away from PW1's house. In the middle of the night, the deceased called and shouted out to PW1. When PW1 went to their house she found it locked. After opening the door, the appellant bolted. The deceased

informed her that the appellant had stated that he had taken some medicine and had threatened to kill himself and ran away from the house. His behavior on the night of the incident was strange in that when the appellant came back, he climbed onto the roof of his house. After the appellant descended, he again ran into the bush. PW1 was restrained by the deceased from following the appellant into the bush because he would have killed her. Later the accused returned home and the couple slept. Around 03:00 hours, the appellant brought his 2 year old child to PW1's house and left. There appeared to be blood on the child's head as observed by a sibling. The said child was prone to nose bleeds.

2.3 The next morning around 06:00 hours, the daughter to deceased informed PW1, that the mother was found dead lying on a mattress in her home. Indeed she found the appellant's wife lying dead on a mattress. She also noticed blood stains on the mosquito net. According to PW1, the couple used to quarrel a lot, hence the appellant's attempt to kill himself. She did not see the appellant murder his wife.

2.4 Pw2 the deceased's daughter to testified that her father had the previous night chased her, the sister, and their mother

from his home. He had told them to leave his house. She confirmed seeing blood on her 2 year old sister's head on the material night.

2.5 The following morning around 05:00 hours, PW2 went to her parents' house, where she found her mother's lifeless body lying in pool of blood. The body appeared swollen. She further observed some blood stains on the mosquito net. On the material day, her parents had quarreled and her father who had a bottle of insecticide threatened to kill himself due to persistent disputes with his wife.

2.6 According to PW3, a nephew, the appellant was apprehended on 26th March 2018 around 06: 00 hours about 26 meters away from his house where he was heard making groaning noises sounding like a pig. The appellant had attempted to take his life. Foam was coming out of the appellant's mouth and nose at the time.

2.7 (PW4) the deceased's brother identified the body of his sister which had a deep cut on the side of the neck and head wounds.

2.8 The Detective Costable (PW5), testified that on 25th March 2018, they found the body of the deceased lying inside the appellant's house in a pool of blood. It had a chop wound on

the head and neck. An axe and hammer were recovered from the scene of the crime behind deceased's house with what appeared to be dried blood stains on it. According to his investigations, the couple had marital problems. On the material night they had quarrel. The appellant had found his wife dancing with another man, and she had threatened to leave the appellant. No forensic examinations were carried out due to lack of logistics. The post mortem report was produced and admitted into evidence. The reason no finger prints were uplifted from the recovered axe and hammer was because he believed the same had been washed away by rain. The deceased denied killing his wife.

3.0 **DEFENCE BY ACCUSED PERSON**

- 3.1 The accused testified that the couple had marital problems. A week earlier the appellant had found his wife at a bar dancing with two men. One was holding her in front and the other was holding her waist from the back. The appellant had scolded his wife and rebuked her for associating with his brother's wife. Her response infuriated him. The wife told him she was leaving the next day for her father's house.
- 3.2 According to the appellant, his wife on the night in issue around 22 hours insisted on going back to her parents' home.

He had only locked the door of the house to restrain her from leaving at night. When PW1 came over, she advised his wife not to leave at night. His wife remained seated at the veranda, and later left their child sleeping on the floor in the house and left.

- 3.3 Around 02:00 hours, the child started bleeding from the nose. At 03: 00 hours, he took the child to PW1's house and thereafter left for his charcoal business. When he returned back home, the appellant found his children crying, and they informed him that their mother was dead in the house. The police upon arrival picked up the appellant and detained him. The appellant did not know the time his wife went back home as he left the house around 03:00 hours. He denied killing his wife. On the night in issue, the appellant testified that he did not quarrel with his wife. As regards his nephew, PW3's testimony, the appellant stated that he was lying when he said the accused was apprehended from the bush a few meters behind the funeral house. The rest of the witnesses' testimony was conceded to be correct as stated by them.

4.0 **HOLDING BY THE COURT BELOW**

- 4.1 The court found that the appellant did murder the deceased in her sleep with malice aforethought. That the evidence was

based on circumstantial evidence. The court inferred that the blood found on the child's head was from the deceased. The learned trial judge found no reason for PW3, the nephew to lie about where the appellant was apprehended. The court held that the case had been proved beyond reasonable doubt.

5.0 **SENTENCE IMPOSED BY THE LOWER COURT**

5.1 When sentencing the appellant, the court held that she found extenuating circumstances namely that, the appellant found his wife dancing with two men, and her intention to leave him enraged him to the extent of contemplating committing suicide. She relied on the case of ***Jack Chanda and Another*** where it was held that a failed defence of provocation can amount to extenuation. The court below entered a verdict of murder with extenuation and sentenced the convict as if he had been convicted of manslaughter and imposed 35 years imprisonment with hard labour. The court took into account the fact that the appellant was a first offender and acknowledged that the offence was serious and was committed in a brutal manner.

6.0 **GROUND OF APPEAL**

6.1 Being dissatisfied with the conviction by the lower court, the appellant raised one ground of appeal;

- (i) **That the learned judge erred in law and fact when it held that the circumstantial evidence in this case was so cogent that it had taken the case out of the realm of conjecture that the only reasonable inference that she could draw from the facts is that the accused killed the deceased.**

7.0 **ARGUMENTS ADVANCED BY THE PARTIES**

- 7.1 The appellant in the heads of arguments dated 10th November, 2020 submitted that the circumstantial evidence had not attained a level of cogency to warrant only an inference of guilt. It is contended that there was no eye witness to the crime. Secondly, no finger prints were uplifted from the axe handle to ascertain who committed the murder or whose blood was on the weapon. The case of **Charles Lukolongo v The People** ⁽¹⁾ was cited on the presumption that evidence available to the police but not placed on record, would have, if been produced, been favorable to the accused.
- 7.2 As regards the blood seen on the deceaseds child's head, it was contended that it was not ascertained whether it belonged to the appellant or not. Therefore, guilt was not the only inference to be drawn. We were referred to the case of

Chimbini v The People ⁽²⁾ as authority and urged to acquit the appellant.

7.3 The respondent in its heads of argument submit that the court below was on firm ground by convicting the appellant on circumstantial evidence, as that was the only inference that could reasonably drawn. Further, that a trial court can safely convict on the basis of on circumstantial evidence as held in the case ***Saidi Banda v The People*** ⁽³⁾ as well as the case of ***Bwanausi v The People*** ⁽⁴⁾.

7.4 It was contended that the evidence was so cogent as to remove the case from the realm of conjecture and leading only to an inference of guilt on the part of the appellant. The respondent proceeded to recite the evidence of what transpired on the night in issue namely; the disagreement between the couple over her dancing with two men, her refusal to stop 'hanging' out with her sister in marriage and the leaving of the child with PW1 at 03:00 hours the night.

7.5 Further, that the next day the wife was discovered dead in a pool of blood in bed. She had a deep wound on the head and neck. The appellant therefore had the opportunity to commit the offence as he was alone with her in the house. As

authority the case of **Phillip Mungala v The People** ⁽⁵⁾ was cited on opportunity amounting to corroboration.

7.6 The respondent went on to contend that the odd coincidences such as the blood seen on the child's head and on the mosquito net, lends support to an inference of guilt as it further implicates the appellant. Reference was made to the case of **Machipisha Kombe v The People** ⁽⁶⁾.

7.7 In regard to the blood observed on the child's head, it was submitted that it most likely belonged to the mother. The lack of medical or forensic examination of the blood on the child does not prejudice the prosecution's case and the conviction is still safe. The case of **Pathias Siame and Paul Nkosi v The People** ⁽⁷⁾ was cited where the Supreme Court stated that;

“our considered view is that the appellants’ arguments about the blood stains is both trivial and of no consequence to the prosecution’s case. In any event, conclusive medical evidence, including evidence of blood groups, is not always necessary for a conviction to be founded and secured. This extends to the cause of death...”

7.7 As regards the failure of the arresting Officer to lift finger prints from the handle of the axe (P1) or test the blood found on it, it was submitted that with the overwhelming

circumstantial evidence on record, no prejudice was occasioned to the appellant. The case of ***Peter Yotum Hamende v The People*** ⁽⁸⁾ was cited in which it was stated that where evidence favorable to an accused person was not adduced on account of dereliction of duty by the Investigating Agency, it will operate in favour of the accused and result in acquittal "unless" the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty. We were urged to uphold the conviction and sentence of the lower court.

8.0 **DECISION OF THE COURT**

- 8.1 We have considered the appeal, the evidence adduced in the court below, the authorities cited and the arguments advanced by the respective learned Counsel.
- 8.2 The appellant has raised one ground of appeal, that the court below erred in fact and law by convicting on circumstantial evidence. The said evidence had not attained such a degree of cogency to take it out of the realm of conjecture leading to the only reasonable inference of guilt on the part of the appellant.

8.3 The guidelines in respect of circumstantial evidence and conviction as set out in the case of **David Zulu v The People** ⁽⁹⁾ by the Supreme Court is as follows;

(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of fact in issue may be drawn.

(ii) It is incumbent on a trial Judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. 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.

8.4 The issue in this appeal is whether the circumstantial evidence had 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.

8.5 The evidence adduced in the court below was that, the couple had marital disputes emanating from the deceased's association with a certain sister in marriage whose conduct the appellant disapproved of. Further, a week earlier the

appellant testified that he had found his wife dancing with two men in a compromising manner. Upon admonishing her, she threatened to leave him and return to her parents' home.

- 8.6 On the material date of the incident the couple had differed. The appellant subsequently chased the wife and her children and told them to leave his house the next day. During the course of the night, PW1 was called by the deceased to the home, which she found locked. Upon opening the door the appellant bolted. When he returned the couple retired to bed. Around 03:00 hours, the appellant brought the youngest child aged 2 years to PW1's home. And the next day the deceased was discovered dead.
- 8.7 In his defence the appellant denied killing his wife and in his arguments contends dereliction of duty on the part of the officers to uplift finger prints from the axe. The investigation officer testified that the prints could not be lifted because they had been washed away by the rains. Further, that the blood stains found on the child's head and mosquito net was not subjected to forensic examination.
- 8.8 We hold the view that the failure to subject the blood stains on the axe handle and mosquito net did not prejudice the

appellant in view of the other overwhelming circumstantial evidence adduced.

8.9 As regards the circumstantial evidence, we are of the view that it was safe for the court below to convict based on it. The circumstantial evidence had taken the case out of the realm of conjecture, attaining such a degree of cogency permitting only an inference of guilt.

8.10 We are satisfied that the learned trial judge was on firm ground when he drew an inference of guilt on the basis of the circumstantial evidence before him. The whole of the circumstantial evidence earlier recited points to the fact that the appellant was the last person to be seen with the wife, after they had differed and she had threatened to go back to her parents.

8.11 Coupled with the odd coincidences of taking the child to PW1 at 03:00 hours and leaving his house. The evidence was so cogent and strong allowing the court below to draw only one reasonable inference, that the appellant is the one who murdered the wife. We refer to the Supreme Court decision in ***Chimbini Vs The People*** where it was stated;

“where the evidence against an accused person is purely circumstantial and his guilt entirely a matter of inference, an

inference of guilt may not be drawn, unless it is the only inference which can reasonably be drawn from the facts.....”

8.12 The lower court upon conviction sentenced the appellant to 35 years imprisonment on the basis of extenuating circumstances such as finding his wife dancing with two men and that her intention to leave him enraged him to the extent of contemplating committing suicide.

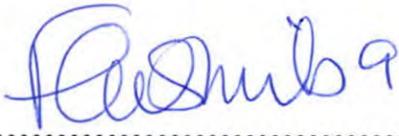
8.13 The court below relied on the case of **Jack Chanda (supra)** on failed defence of provocation. The issue is whether there were any extenuating circumstances to render or reduce the punishment to be imposed.

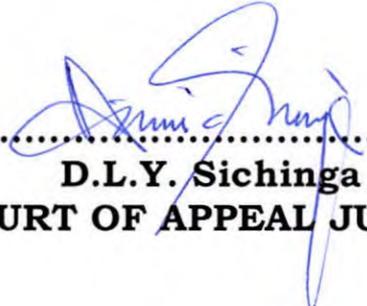
8.14 We are of the view that there are no extenuating circumstances to warrant the sentence imposed by the court below. The incident of finding his wife dancing with two men a week earlier cannot be deemed an extenuating circumstances. No defence of provocation was raised by the defence. In fact, the appellant testified that he did not fight with his wife on the material date. We are also of the view that the mere threats by the wife of leaving the appellant or relationship is not an extenuating circumstances. Neither was the appellant's contemplation of murder an extenuating circumstance.

8.15 We hold that the court below erred in law and fact by holding that there were extenuating circumstances. The sentence was not only wrong in principle but comes to this court with a sense of shock. We hereby set aside the sentence imposed by the court below and substitute it with the prescribed sentence for murder, namely the death sentence.

8.16 For the forgoing reasons the appeal is accordingly dismissed.

.....
M. M. Kondolo, SC
COURT OF APPEAL JUDGE


.....
F.M. Chishimba
COURT OF APPEAL JUDGE


.....
D.L.Y. Sichinga
COURT OF APPEAL JUDGE