## JOHN NYAMBE LUBINDA v THE PEOPLE (1988 - 1989) Z.R. 110 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.
18TH NOVEMBER 1988
(S.C.Z. JUDGMENT NO. 16 OF 1988)

### Flynote

Evidence - Evidence available only to police - Presumption that evidence is favourable to accused when not produced.
Evidence - Post-mortem report - Doctor not available - Duty to produce report under provisions of Criminal Procedure Code.

### Headnote

The accused was charged with murder. At his trial the prosecution produced evidence, *inter alia*, to show that a watch worn by the deceased was found in the possession of the accused. There was conflicting evidence of the prosecution in identifying the characteristics of the watch and one witness stated the watch had been identified by the brother-in-law of the deceased. The brother-in-law did not give evidence.
Although there was a post-mortem report the report was not put in evidence nor was the doctor who carried out the post-mortem called to give evidence. There was no evidence as to the cause of death.
The accused was convicted and appealed.

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**Held:**

(i) Where evidence available only to the police is not placed before the Court must be assumed that had it been produced it would have been favourable to the accused.
*Kalebu Banda v The People* (1977) Z.R. 169 followed.

(ii) Where a doctor is not available to produce a post-mortem report it should be produced in Court under the provisions of section 19(1) of the Criminal Procedure Code, Cap. 160 which makes it mandatory for the Court to admit such document in evidence.

**Cases referred to:**

(1) Kalebu Banda v The People (1977) Z.R. 169
(2) Ali and Another v The People (1973) Z.R. 232

**Legislation referred to:**

Criminal Procedure Code, Cap .160, s .19(1)

For the appellant: C. P. Sakala, Director of Legal Aid.
For the respondent: K. C. Chanda, Senior State Advocate.

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### Judgment

**GARDNER, J.S.:** delivered the judgment of the Court.

The appellant was convicted for murder; the particulars of the charge being he, on 21st February 1986, at Sesheke, did murder Hellen Nachiza Mazila.

The prosecution evidence was to the effect that a schoolgirl, the deceased, Hellen Mazila, left Sesheke Secondary School, on 21st February 1986, and did not return to her School. Some time later, the body of this girl was found in a field.

There was evidence from PW4, that this witness saw the deceased on 21st February 1986, in the company of a man whom the witness had not seen before, and this witness identified the appellant in Court as having been the man whom she had seen with the deceased.

Mr Sakala, Director of Legal Aid, has argued on behalf of the appellant that there should have been an identification parade at which PW4 should have had an opportunity to identify the appellant, and that the identification in Court was of little or no value. He further argued that the identification of a watch was unsatisfactory.

Our attention was drawn to the evidence of PW5, a school friend of the deceased, who said that she had known the watch that the deceased had worn for the last twelve months. In her evidence-in-chief, this witness said that the watch worn by the deceased had a crack on it from top to bottom, and, although she purported to identify the watch, which was produced in Court as having been found on the appellant, she agreed in her evidence that the crack on the watch in Court ran from left to right. Mr *Sakala* argued that, as the learned trial Judge had not resolved this discrepancy in the course of his judgment, there was a misdirection as to the finding by the learned trial Judge that the watch had been properly identified. He further pointed out that PW6, the witness who had found the watch on the appellant, had given evidence that the watch had been identified by a young boy who was a brother-in-law of the deceased. It was argued that the failure to call that evidence in support of the prosecution made it necessary to bring into play the principle which we set out in the case of *Kalebu Banda v The People* (1). In that case we said:

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> "Where evidence available only to the police is not placed before the Court it must be assumed that had it been produced it would have been favourable to the accused."

Mr *Chanda*, on behalf of the State, indicated that he would not support the conviction.

On its own motion, the Court raised a question as to whether or not there was sufficient evidence to indicate that the deceased died of unnatural causes. In the course of the trial, the prosecution indicated that it intended to put in a post-mortem report from the doctor who examined the body of the deceased. When this proposal was made there was an objection by the defence counsel, and the state advocate at the time said that, as the doctor had left the country, he would neither put in the post-mortem report nor would ask to call the doctor from overseas. In the event, therefore, there was no evidence whatsoever as to the cause of the death, and, albeit that when the body was found buried in the field, some very serious suspicions must have arisen, it is surprising that in a capital case the prosecution took no further steps to support the charge fully against the appellant.

In this case, we are not satisfied that everything was done to place before the Court the available evidence as to the cause of death. It may well have been that, as the body was not found for some period after it was buried, the doctor was unable to establish the cause of death. If this was the case then the Court should have been told so by the production of the post-mortem report under the provision of section 19(1) of the Criminal Procedure Code (Cap .160), which makes it mandatory for the Court to admit such a document in evidence. As it is, the evidence before the Court was insufficient to substantiate a charge of murder. It follows, therefore, that what we have to say about the arguments of the learned Director will be obiter, but we will deal with them in order to make our position clear.

We agree with Mr Sakala that there should have been an identification parade at which PW4 should have had an opportunity to identify the person whom she saw with the deceased. We agree with the quotation from the case of *Ali and Another v The People* (2) that an identification in Court is of little or no value, especially where there is no satisfactory explanation for failing to hold an identification parade. The acceptance by the learned trial Judge of the evidence of PW4 in the manner set out in his judgment amounted to a misdirection. We also agree with Mr *Sakala* that the discrepancy as to the description of the watch worn by the deceased and the watch produced in Court with regard to the position the crack should have been resolved by the learned trial Judge in his judgment, and failure to resolve this issue amounted to a further misdirection. For the reasons we have given, this appeal will succeed.
The appeal is allowed, the conviction is quashed and the sentence is set aside.

Appeal allowed.

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