**IN THE SUPREME COURT FOR ZAMBIA SCZ Appeal No.129/2011**

**HOLDEN AT NDOLA**

**(Appellate Jurisdiction)**

**IN THE MATTER BETWEEN:**

**JOSEPH SIKAONA APPELLANT**

**AND**

**THE PEOPLE RESPONDENT**

**CORAM: CHIBESAKUNDA, WANKI AND MUSONDA, JJJS.**

**On 21st March 2012 and 10th July 2012**

***For the Appellants: Mr. Z. Muzenga – Acting Principal State Advocate***

***For the Respondents: Ms. M. P. Lungu – Senior State Advocate***

**J U D G M E N T**

**Musonda, JS, delivered the Judgment of the Court.**

***Cases Referred To:***

1. ***Nzala V The People (1976) ZR 221.***
2. ***Kalaba V The People (1981) ZR 102.***
3. ***David Zulu V The People (1977) ZR 151.***
4. ***R V Turnbull and Others (1976) 3 AII pages 550 – 551.***

***Legislation Referred To:***

***Sections 200 and 201 Penal Code Chapter 87 of the Laws of Zambia.***

***Works Referred To:***

***Soanes Catherine, Stevenson Angus, Concise Oxford English Dictionary Eleventh Edition Revised, Oxford: University Press, 2008.***

This is an appeal against the Judgment of the High Court convicting the appellant of murder. It was alleged that on a date unknown, but between the 8th and 9th November 2007 at Nakonde, in the Nakonde District of Northern Province of the Republic of Zambia, the appellant murdered Ackson Simbeye. He was sentenced to death. He now appeals against both conviction and sentence.

The prosecution’s evidence centred on four witnesses PW1, PW2, PW3 and PW4.

PW1 Nicholas Simbeye testified that in the morning of 8th November 2007 his father Ackson Simbeye left home around 10:00 hours. He took his cattle for grazing in the bush. Around 17:00 hours PW1 saw the cattle wandering unattended to and herded them home. His father did not return at his usual time of between 17:00 – 18:00 hours. After 19:00 hours PW1 went back to the field and followed the direction from where he had seen the animals emerge. He made inquiries from neighbouring villages and also went to accused’s house whom he found with his wife and children. Accused said they had not seen the animals. His wife, told him she had only heard cattle at a distance from where PW1 had come from. PW1 however, noted animal hoof marks very near their house, as he left.

PW1 proceeded to inform his father’s brother Agrippa Simbeye and other relatives some of whom followed him back home and kept vigil. Early the following morning on the 9th November 2007, a search by relatives and other villages yielded his father’s dead body. PW1 and others found it in a swampy area where his father used to take his animals for grazing.

PW2, Justine Simbeye was another son of deceased. He testified that after he was informed of his father’s failure to return home by PW1, they could not pursue the matter on that day as it was late. The following morning 9th November 2007, together with others they headed for the grazing lands where his father used to take the animals. His body was found there and upon examining it, PW2 observed gunshot wounds at the back of the right shoulder and the right cheek. Near the body they found a spent cartridge, an axe, a raincoat and a pair of slippers known as tropicals. After searching the surrounding area he observed shoe marks of ordinary shoes, tackkis shoes and those of “Jesus” sandals i.e. homemade shoes from tyres of motor vehicles.

After police arrived, they followed the direction of the “Jesus” sandals shoe prints. Some distance of 30 – 40 minutes away, they found a piece of tree bark lying on the ground with its inside part facing the ground. Inside this bark was another spent cartridge, some charms and nearby was also a bottle of mineral water with a label on which was written “maji pa”. Three hundred metres further, the shoe prints took them to a torn piece of bark from the same tree. The “Jesus” sandals left prints of 3 lines in the middle and a “V” which appeared like an “M”.

Finally the shoe prints led to appellant’s house, from where a search was conducted by police, and a pair of “Jesus” sandals were recovered, with a similar pattern as the prints they had been tracing.

PW3 was Agrippa Simbeye, deceased’s elder brother. He testified that on 8th November 2007, he went to his bank in Nakonde. Whilst there, he met with appellant’s grandfather who requested PW3 to go and inform the appellant of his grandmother’s death in Tanzania. When he got back to the village at around 16:00 hours, PW3 went to appellant’s house to deliver the funeral message. There, he found appellant with two other men about his age, whom he did not know. They all appeared to be furious and did not respond to his greeting. After he had gone back home and about 20:00 hours, PW1 went to his home and informed him that his brother had not returned from where he had taken his cattle for grazing. PW3 went to his brother’s house to confirm and stayed up to midnight.

The following morning on 9th November 2007 they went to search for the missing person and discovered his dead body in the bush lying in a pool of blood. When the police came they confirmed he had been shot. On 10th November 2007, he attended the postmortem examination conducted on the body on his brother Ackson Simbeye, which he identified to a doctor. The appellant did not attend the deceased’s funeral because he disappeared in the morning of Friday, 9th November 2007.

PW4 was the arresting officer Epidus Kasoma Chibango. He testified that following a complaint by PW1 that his father had been killed, he went to the scene of crime in Mayembe Village Chief Nawaitwika, Nakonde District. Accompanied by two officers, he picked a spent cartridge 5 – 7 metres from the deceased’s body. The cartridges were suspected to have been fired when killing the deceased. Since it was rainy season he observed three different set of foot prints: ordinary shoes, from tackkis and those made from motor vehicle tyres popularly known as “Jesus” sandals. The distinctive feature of the latter shoe print was that, they left 3 clear lines and “V” shapes on the ground.

After following this print for half a kilometer, they came across a piece of tree bark which is used by the local community to fend off the ghost of a person who killed. Under that bark was a spent cartridge, some charms and a plastic bottle of mineral water. Some distance from that point, they came across another piece of bark from the same type of tree.

Finally the “Jesus” shoe print came to a dead end at the house of the accused where they could found a tree with some of its bark removed, which bark was similar to those recovered on the way from the scene of crime. At appellant’s house the children told the witness that their parents had gone to attend the deceased’s funeral. A search both inside and outside led to the recovery of a pair of “Jesus” sandals in the roof, outside appellant’s house. The witness then decided to go and apprehend the accused. When the witness got to the funeral house, he only found the appellant’s wife, who confirmed that the “Jesus” sandals belonged to her husband (the appellant). She informed the witness that the appellant had left for Nyela Village to inform his grandfather of the death of his grandmother in Tanzania.

On the 10th November 2007, the witness attended a postmortem conducted on the deceased body, which was identified by his brother Agrippa Simbeye as that of Ackson Simbeye. The examination disclosed gunshot wounds to the head and stomach, as the cause of death. The following day the appellant reported himself at Nakonde police station. The appellant denied the charge after being warned and cautioned saying he had been away to Nyela Village at the material time. That was the evidence for the prosecution.

The appellant gave unsworn statement. He stated that he was away at the material time. He had received a message of his grandmother’s death from Isaac Siwila of Tanzania on 6th November 2007. On the 7th at 16:00 hours, he left his village for Nyela Village to inform his grandfather Kedrick Sikaona. He spent a night at a rented home in Nakonde. The following day which was the 8th November 2007, he left for Nyela and on the way met Dainess Nambeya who informed him of his uncle’s death. He was shocked and surprised.

When he reached Nyela he informed his grandfather of his uncle’s death and told him he would not go with him to Tanzania, but instead would go for his uncle’s funeral. He again spent a night at Nakonde and proceeded to his home on the 9th November, 2007. He found his wife had gone for his uncle’s funeral and his children informed him police had been looking for him. That is how he returned to Nakonde where he immediately reported himself to the police between 13:00 – 14:00 hours. He concluded his testimony by saying deceased raised him after his own father died and they related very well with each other. The appellant confirmed the “Jesus” sandals were his old pair of shoes, but denied killing his uncle.

The learned trial Judge found that the evidence connecting the appellant to the commission of the offence came from PW2, PW3 and PW4. It was these witnesses common evidence that: shoe prints left by “Jesus” sandals were traced from where the body lay to appellant’s house. The pair of “Jesus” sandals, which the appellant did not deny were his, were recovered from his house.

The appellant raised a defence of alibi in the court below, that he was not in the area at the material time. Evidence in rebuttal of this alibi, came from PWs 1, 3 and 4. PW1 had testified that he had found appellant with his family at his house at the village after 19:00 hours on the 8th November 2007. PW3 who had gone there earlier said he had left appellant home with two companions whom he had not seen before and the time was around 16:30 hours. It was the evidence of PW4 that his investigations of the appellant’s alibi established that he left his house sometime in the morning of the 9th November, 2007. He was seen crossing the barrier by the police manning the same and variously spotted in Nakonde that morning.

PW4 summoned the appellant’s grandfather of Nyela Village who upon being interviewed confirmed that the appellant went to see him in Nyela Village in the morning of the 9th November, 2007. The evidence of those witnesses was not challenged in cross-examination. The appellant in his unsworn statement did not deny that he went to Nyela Village in the morning of 9th November, 2007.

The learned trial Judge cited our decision in ***Nzala V The People,*** where we said:

***“Where an accused person on apprehension or on arrest puts forward an alibi and gives police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it”***

The trial Judge found that the alibi had been negated by the prosecution. However, the failure of the defence of alibi is no proof of accused guilt and does not relieve the prosecution of the burden of proof. The trial court noted the evidence of PW1, PW2 and PW3 in cross-examination which established that there was a lingering dispute over land between the appellant and the deceased and that land disputes, particularly where they are a source of livelihood are emotive issues generally. There was tension between the appellant and deceased.

The failure of the defence of alibi went to establish that the appellant was in the village at the material time and had an opportunity to commit the offence. The distinct shoe prints of “Jesus” sandals were traced from the scene of crime to his doorstep which he confirmed were his. The barks of trees whose source was from a tree near his house were found in unexplained circumstances. These were odd coincidences, which remained unexplained and provided a connecting link of the appellant committing the offence and constituted supporting evidence. The learned Judge cited our decision in ***Kalaba V The People***(2) for that proposition of the law.

On the totality of the circumstantial evidence the learned trial Judge was satisfied that the case was taken from the threshold of speculation and had attained a degree of cogency which permits an inference of guilt as the only reasonable one that can be drawn. Our decision in ***David Zulu V The People(3)*** was cited for that proposition of the law.

On behalf of the appellant Mr. Muzenga filed two grounds of appeal. The first ground was that the learned trial Judge erred in law and in fact when she convicted the appellant on circumstantial evidence when an inference of guilt was not the only inference which could reasonably be drawn from the facts. The second ground, which was an alternative to ground one, was that the learned trial court misdirected itself in law and in fact by its failure to find extenuating circumstances so as to impose any other sentence other than death as the same were apparent on the record.

In his Heads of Arguments, in support of ground one Mr. Muzenga argued that the circumstantial evidence against the appellant is mainly that some shoe prints were seen near the scene of the crime heading up to the appellant’s house and the said shoes were recovered at his house. He urged us to follow our decision in ***David Zulu V The People supra***, where we said:

1. ***“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 and from which an inference of fact in issue may be drawn.***
2. ***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”***

In the case before us, the shoes that were suspected to have prints near the scene of crime were found hanging outside the appellant’s house roof and no firearms was recovered from him. It was Mr. Muzenga’s submission that the circumstances referred to did not take the case outside the realm of conjecture and as such the conviction was not safe.

In support of ground two, it was argued that the learned trial Judge found that there was a lingering land dispute between the appellant and the deceased, and that would have been the motive. That land issues as a source of livelihood are emotive. She should have found this as an extenuating factor which should have persuaded her to impose any other sentence other than the mandatory death sentence.

Ms. Lungu supported the conviction. She submitted that the trial court was on firm ground when the court convicted on circumstantial evidence. On 8th November 2007 deceased went missing, the body was found. It was the evidence of PWs 2, 3 and 4, that the shoe prints were identified, one bark of the tree had a charm and bullet. The charms were used to fend off the spells of the deceased. At the appellant’s house there was a bark of the tree which was found. The “Jesus” sandals which were at the scene, the appellant admitted belonged to him. The appellant gave an alibi, which was discounted by the evidence of the prosecution. The appellant and deceased had a misunderstanding over land. These were odd coincidences.

Arguing the second ground, Ms. Lungu submitted that the court below did consider that there was a dispute and that, that was not an extenuating circumstance but a motive. Therefore, there was no misdirection. Mr. Muzenga in reply said the case of ***Jack Chanda V The People supra*** set guidelines but did not exhaust or limit extenuation under Section 201. The section talks of any factor which, morally diminishes the moral blameworthiness. The section is not restrictive, but extensive. There was a lingering dispute over land and can be highly emotive to people of the class of the appellant, which could be extenuating.

We have considered the filed grounds of appeal, Heads of Arguments and the oral agreements in-depth. The two grounds of appeal raise the issue of identification by a single witness, when should a court convict. A prior land dispute between the appellant and deceased, could it amount to extenuation within the meaning of Section 201 of the Penal Code?.

In ***R V Turnbull and Others***(4), the English Court of Appeal Criminal Division said:

***“However, odd coincidences if they remain unexplained may be supporting evidence”***

We adopted this dictum in ***Kalaba V The People supra***. The learned trial Judge alluded to the evidence of distinct shoe prints namely “Jesus” sandals traced to the appellant’s house and found on his rooftop. A bark under which a spent cartridge was found whose source was a tree at the appellant’s house, the negation of his alibi by the prosecution. We note that PW3 found appellant with two others who did not answer when he greeted them and that was on 8th November 2007, the day of the murder. Coincidentally there were three shoe prints from the murder scene to the house of the appellant.

The appellant left a dead body of an uncle at the village to go and mourn a grandmother in Tanzania, who had already been buried, is that the conduct of an innocent loving nephew as he portrayed himself in his defence, we think not. These were odd coincidences which were not explained and they turned out to be supportive evidence. There was ample circumstantial evidence leading to only one inference that the appellant committed the murder either alone or in confederation with other two persons, whose shoe marks were at the scene and led to his house and these persons were found by PW3 at the appellant’s house.

We now have to consider the appellant’s alternate ground. It was canvassed for the appellant, that the learned Judge having found that the killing was motivated by the land dispute, extenuation should have been available to the appellant.

Section 201 (2) is couched in these terms:

***“(2) For the purpose of the Section –***

1. ***An extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person’s guilt;***
2. ***In deciding whether or not there are extenuating circumstances, the court shall consider the standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs”***

We are of the view that by the legislature using the words, “an extenuating circumstance is any fact associated with the offence” meant that there must be a foundation led by way of evidence of a fact or facts, which would diminish morally the degree of the convicted person’s guilt.

In the case before us, the fact of extenuation was not sufficiently canvassed at trial. It has only been alluded to an appeal. It is our considered view that there is no merit in the second ground of appeal. The result is that the appeal against conviction and sentence is dismissed.

……………………………….... ……..…………………………

L. P. Chibesakunda W.E. Wanki

**SUPREME COURT JUDGE SUPREME COURT JUDGE**

……………………………………….

P. Musonda

**SUPREME COURT JUDGE**