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IN THE SUPREME COURT OF ZAMBIA Appeal No. 44/2015
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

NOAH MULWANI **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Phiri, Wanki and Muyovwe, JJS
On the 5th May, 2015 and 2nd February, 2016

For the Appellant: Mr. M. Kabesha of Messrs. Kabesha & Company

For the Respondent: Mr. B. Mpalo, Senior State Advocate

JUDGMENT

MUYOVWE, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Patrick Sakala vs. The People (1980) Z.R. 205**
2. **Yoani Manongo vs. The People (1981) Z.R. 152**
3. **Sipalo Chibozu & Others vs. The People (1981) Z.R. 28**
4. **R v. Turnbul (1976) 3 ALLIR 549 (1977) QB 224**
5. **Timothy Mwamba vs. The People (1977) Z.R. 394**
6. **Kambarage Mpundu Kaunda vs. The People (1990/1992) Z.R. 215**
7. **The People vs. Swillah (1976) Z.R. 338**
8. **David Zulu vs. The People (1977) Z.R. 151**
9. **Machipisha Kombe vs. The People (2009) Z.R. 282**

10. Haonga and Others vs. The People (1976) Z.R. 200

When we heard this appeal, we sat with Mr. Justice Wanki. He has since retired and therefore, this Judgment is by the majority.

The appellant was convicted of the offence of murder contrary to Section 200 of the Penal Code by the Kabwe High Court.

In summary, the facts in the lower court were that on 11th April, the deceased who was in good health went for work in the morning and arrived home around 20:00 hours and then went to visit a neighbour. She returned home around 22:00 hours and the family retired to bed around midnight. According to PW2 and PW3 the son to the deceased, around midnight a knock was heard at the door. The deceased inquired as to who was knocking and the voice of the appellant was heard responding that it was him. The deceased then opened the door and the appellant who was the deceased's boyfriend entered the house. In the morning, it was discovered that the door was wide open and the deceased was found dead in her bedroom. PW2 and PW3 said they had known the

appellant since September 2012 and that he had been frequenting the deceased's house and spent nights with the deceased. According to the two witnesses prior to the incident, the appellant was last seen at the house a week earlier as the two had had an argument.

The police officers who visited the scene observed that the deceased had no physical injuries. The body was only clad in an underwear which was worn in the wrong way. The postmortem examination report revealed that the cause of death was brain hemorrhage and brain edema caused by severe head injury; cardio-respiratory failure and severe hypoxia as a result of suffocation by close of upper airways by a soft object. The appellant, on being interviewed by the police admitted going to the deceased's house on the night in question. He claimed he did not enter her house instead he discussed with her outside the door. The appellant was charged with the murder of the deceased.

In his defence, the appellant said on the 11th April, 2011 he was at a tennis club drinking beer when the deceased phoned him that she wanted to see him. Around 23:00 hours, DW2 (Bright

Kafupi) drove him to the deceased's house. DW2 parked the vehicle 10 metres away from the deceased's house. The appellant explained that DW2 waited for him in the car. He went to the deceased's house where he knocked at the door and since there was no response, he left and drove away with DW2. Later, he bought airtime and spoke to the deceased. The following day, he was informed that the deceased had passed on. The police apprehended him and he was charged with the murder of the deceased. He said the deceased was not his girlfriend but a mere friend and that on the night in question he had gone to the deceased's house to discuss about the house he intended to rent from her.

Bright Kafupi (DW2) the appellant's lone witness said on the material day he was in the company of the appellant at the tennis club drinking beer from 17:00 hours to 23:00 hours. While they were drinking, the appellant received a call from the deceased that he needed to go and see her. Around 23:00 hours, he dropped off the appellant near the deceased's house and he left. He denied waiting and leaving with the appellant.

On this evidence, the learned trial Judge in his judgment found the appellant guilty as charged and convicted him of murder with extenuating circumstances on the basis that the appellant was drunk at the time he committed the offence and sentenced him to 25 years imprisonment with hard labour. The appellant has appealed to this Court against conviction only.

On behalf of the appellant, Mr. Kabesha Counsel for the appellant advanced three grounds of appeal couched in the following terms:

1. **The trial Judge erred both in law and fact in convicting the Appellant for murder on evidence which circumstantially does not link him to the offence.**

2. **The trial Judge erred both in law and fact by relying on the evidence of PW2 and PW3 as corroborative whose evidence was largely unreliable.**
3. **The trial Judge erred both in law and fact in rejecting the appellant's evidence on account of the Appellant having lied.**

Mr. Kabesha relied on the Heads of Argument filed herein. Counsel argued that the circumstantial evidence in this case falls short of the required standard of the guidelines set in **Patrick Sakala vs. The People**[1] where it was held that the circumstantial evidence must be so cogent and compelling that no rational

hypothesis other than murder could the facts be accounted for. He referred us to the case of **Yoani Manongo vs. The People**[2]. He contended that there is doubt as to the cause of death in this case having regard to the summaries in the postmortem report. According to Mr. Kabesha, the postmortem report brings out three probabilities as to the cause of death which he summarised as "severe head injury, **probably** by a blunt semi-hard object ..... Also, can't exclude suffocation by close of upper airways by soft object (**probably pillow**) .....Two scratches at the anterior surface of the thigh, measuring **10.0 x 0.3** cm each, **probably from finger nails**." Mr. Kabesha submitted that the three probabilities should invite doubt in the mind of the Court to warrant the appellant to be set at liberty. Relying on the case of **Sipalo Chibozu vs. The People**,[3] he submitted that it was highly desirable in this case for the person who carried out the postmortem examination to testify in order to clarify issues contained in the report. Mr. Kabesha contended that on this ground the appellant should not have been convicted of murder.

Turning to ground two, Counsel attacked the reliability of the evidence of PW2 and PW3. He pointed out that PW2 and PW3's evidence was that they heard a voice of someone outside the deceased's house. Counsel argued that there was no voice identification parade to confirm that the voice, if at all there was one, which PW2 and PW3 heard on the fateful night, was indeed that of the appellant. He contended that failure to conduct a voice identification parade was a dereliction of duty on the part of the police and that the presumption should be that, if indeed the witnesses heard a voice, it did not belong to the appellant. He invited us to consider the principle in **R vs. Turnbul**[4] and **Timothy Mwamba vs. The People.**[5] He argued that the identification by voice is more stringent than that of visual identification.

Further, he contended that the trial Court should have been cautious in its treatment of PW2 and PW3's evidence as they were related to the deceased. On this point he relied on the case of **Kambarage Mpundu Kaunda vs. The People.**[6]

Turning to ground three, he contended that the trial Judge erred both in law and fact when he rejected the evidence of the appellant on account that he lied, adding that this was not conclusive evidence of his guilt. We do not appreciate Mr. Kabesha's reasoning when he referred us to the High Court case of **The People vs. Swillah.**[7]

In response to ground one, Mr. Mpalo the learned Senior State Advocate submitted, inter alia, that the circumstantial evidence adduced before the trial Court and the totality of the evidence was such that any reasonable tribunal would draw an inference of guilt on the part of the appellant. He pointed out the fact that the appellant was the last person 'seen' or heard in the presence of the deceased and the circumstances relating to the cause of death including "the scratches at the anterior surface of the left thigh" as reflected by the postmortem report, are all facts which, taken together, strongly support an inference that the appellant murdered the deceased. Counsel argued that the doctor's report is clear that the deceased died from severe head injury. He contended that there is nothing strange in the fact that the doctor speculated that the

injuries could have been inflicted by a blunt semi-hard object. That the doctor could not rule out suffocation and that, therefore, this could not mean that he was uncertain as to the cause of death. As regards the scratches, the anterior surface of the thigh of the deceased measuring 10.0 x 0.3 cm indicated in the report, the doctor was merely trying to show that these could have been caused by finger nails. Counsel further submitted that these scratches were odd coincidences which support the conclusion that the deceased was murdered and further ruled out the possibility of a natural death as the appellant seemed to suggest. He urged us to dismiss ground one.

In relation to ground two, he contended that the appellant at trial did not deny that he went to the deceased's house and that in fact his own testimony gave credence to the evidence of PW2 and PW3 when in his evidence PW2 said *"I heard a knock at the door. She asked who was knocking at the door."* There is no doubt, therefore, Mr. Mpalo agreed that the appellant went to the deceased's house on the night the deceased was allegedly murdered. According to Mr. Mpalo, the critical question is whether

the visit to the deceased's house links the appellant to the death of the deceased. Counsel pointed out that PW2 said in her testimony that:

> **"I heard Noah's voice and recognised it. I came to know Noah since September, 2012. He was the boyfriend of Linia Chifwala (the deceased). She opened the door and someone entered."**

He submitted that the above evidence corroborates that of the minor, PW3 who also testified as follows:

> **"He knocked and I heard his voice. When he knocked my mother asked who was there. He answered "ninebo" I knew his voice...**
>
> **The door was opened and I heard his shoes going to the bedroom."**

Counsel argued that the evidence of PW2 and PW3 suggests that the appellant entered the house and, therefore, he had the opportunity to commit the offence.

He pointed out that on the other hand the appellant claimed that no one answered when he knocked at the deceased's house and that he went back to the car and asked for talk-time from his friend DW2 who had remained in the car. However, DW2

contradicted the appellant's testimony that he left the car to go and see the deceased and that he came back later. Mr. Mpalo submitted that the learned trial Judge was on firm ground when he dismissed the evidence of the appellant based on the contradictions between his evidence and his own witness DW2. In his view, the Court found PW2 and PW3 more credible than the appellant.

He contended that the argument that PW2 and PW3 were suspect witnesses should not be entertained. He contended that the critical consideration is whether they had a motive to give false evidence and he relied on the case of **Chibozu and Others vs. The People.**[3]

On the issue of voice identification, he submitted that in this case the Court depended on the perception of the witnesses regarding the voice of the offender. That PW2 and PW3 stated that they were familiar with the appellant as he used to visit their place quite regularly. Counsel contended that, therefore, the danger of mis-identification cannot arise.

With regard to ground three, he submitted that contrary to the appellant's submission, the trial Court did not take the lie told by the appellant as conclusive evidence of his guilt. He cited page J13 of the Judgment where the trial Court stated as follows:

> **"Further, I agree with Counsel for the prosecution that the accused lied before this Court when he said DW2 waited for him as he knocked on the door of the deceased because the same was denied by DW2."**

According to Mr. Mpalo, the above statement shows that the trial Judge was merely agreeing with the observation by the prosecution. He contended that there is no indication that the Court relied on the said lie to convict the appellant. Further, that it is trite that where a witness lies on one issue, the weight to be attached to the evidence is affected. That in this case, the lie told by the appellant affected his reliability and credibility. He submitted that in the light of the foregoing, the trial Court was on firm ground when he convicted the appellant. Counsel urged us to dismiss the appeal.

We have considered the evidence on record, the Judgment appealed against and the arguments by learned Counsel for the

parties. We will deal with grounds one and two together as they are somewhat interrelated.

In ground one, the gist of the argument by Counsel for the appellant is that the appellant was convicted on circumstantial evidence which was not cogent. Also, that the postmortem report on the cause of death pointed to three possibilities which should cause doubt in the mind of the court. On the other hand, Counsel for the State submitted that the circumstantial evidence was cogent. And that the findings in the postmortem report taken together with the other evidence on record all point to the appellant as the one who murdered the deceased. In ground two, the gist of the submission by Counsel for the appellant was that PW2 and PW3 were unreliable witnesses and the court should have treated them as suspect witnesses as they were relatives to the deceased. Also, that there was dereliction of duty when the police failed to do voice identification of the appellant following the testimony of PW2 and PW3. The State submitted that PW2 and PW3 were reliable witnesses as they had known the appellant since 2012 as the boyfriend to the deceased and they knew his voice. Counsel added

that the learned judge found PW2 and PW3 more credible than the appellant.

We have combed the record and we are alive to the testimony of PW2, PW3 and DW2. According to PW2 and PW3 they heard a knock at the door, the deceased inquired as to who it was, and both said they heard the voice of the appellant identifying himself and thereafter the appellant was allowed into the house as they heard his footsteps heading to the deceased's bedroom. We agree with Mr. Mpalo that PW2 and PW3 who were residing with the deceased, having known the appellant since 2012, they were familiar with his voice. There was evidence that the appellant was the boyfriend to the deceased and frequented her home. And on the material night, evidence on record especially from his own witness DW2 confirmed that the appellant went to the deceased's house and DW2 left him there around midnight. This evidence corroborates the testimony of PW2 and PW3 who said on the material night, the appellant arrived at the deceased's house at midnight. In the morning around 05:00 hours, the deceased was found dead in her bed and

the appellant was no longer in the house. In the case of **Machipisha Kombe vs. The People**[9] we held, inter alia, that:

> **3. Corroboration is independent evidence which tends to confirm that the witness is telling the truth when he or she says that the offence was committed and that it was the accused who committed it.**

Therefore, it is fair to conclude that the appellant was the last person with the deceased. No evidence suggests otherwise. In our view, this evidence strongly links the appellant to the offence and we therefore do not agree with the submission of the learned Counsel for the appellant. According to the postmortem report, the cause of death was:

> **"Severe head injury, probably by a blunt, semi-hard object: brain contusion, large subdural and subarachnoidal brain hemorrhage at the Lt. and Rt. Temporal area of brain and at the base of brain, severe brain edema, cardio-respiratory failure, severe hypoxia. Also, can't exclude suffocation by close of upper airways by a soft object (probably pillow): dotted hemorrhages to the eyes sclean, tongue is bitten, severe lung edema and emphysema. Bruise at the left arm, measuring 10.0 x 6.0 cm. Two scratches at the anterior surface of left thigh, measuring 0.4 x 0.3 cm. each, probably from finger nails. ..."**

From the postmortem report and the circumstances of this case, it is clear to us that the deceased did not die of natural causes.

On the evidence of PW2 and PW3, we agree that the learned trial judge did not warn himself of the danger of false implication arising out of the possible interest to serve of the witnesses. However, in this case, there is the supporting evidence of DW2, the appellant's own witness that he dropped the appellant who was on a mission to see the deceased at that late hour near the deceased's house. The danger of false implication was therefore ruled out. Further, even the argument on the failure by the police to hold the voice identification parade cannot be sustained in the face of the strong evidence pointing to the guilt of the appellant.

Also we are of the view that the evidence of the appellant and indeed of his witness DW2 places the appellant at the scene of crime and therefore, he had the opportunity to commit the offence.

Looking at the evidence placed before the learned trial Judge, we cannot fault him for arriving at the conclusion that he did. Therefore, grounds one and two fail.

Coming to ground three, Mr. Kabesha submitted that the fact that the appellant told a lie was not conclusive evidence of his guilt. Mr. Mpalo submitted that the court did not find the appellant guilty on the basis that he had told a lie but that the lie affected his credibility. We agree with the submission by Counsel for the State that the learned Judge merely agreed with the State that the appellant had lied and not that it was the basis for the appellant's conviction. We have also noted the contradiction in the evidence between the appellant and DW2. Indeed, the appellant lied on the material evidence suggesting that he left the deceased's house with DW2. However, DW2 denied it and said he left the appellant at the deceased's house. This is very crucial evidence. In the case of **Haonga and Others vs. The People**[10] we held, inter alia, that:

> **(iv) Where a witness has been found to be untruthful on a material point the weight to be attached to the**

remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful...

Clearly, the learned Judge was right in finding that the appellant lied. And when his untruthful part is discounted, it therefore follows that DW2, PW2 and PW3 told the truth and we do not fault the learned Judge for believing their testimony. We are of the view that the learned Judge rightly convicted the appellant for the murder of the deceased. Ground three also fails.

We have noted that the appellant was found guilty of murder with extenuating circumstances on the basis that he had been drinking beer prior to going to the deceased's house. However, we have failed to find any extenuating circumstances in this case. Other than the mention that the appellant was drinking beer, there is no evidence suggesting that the appellant was drunk at the time he committed this offence. From the circumstances of this case, we are of the view that the deceased was murdered in cold blood

and the appellant was not under the influence of alcohol. In view of the misdirection by the learned trial judge, we set aside the sentence of 25 years and impose the mandatory death sentence.

In sum, all the grounds of appeal fail and the appeal is dismissed accordingly.

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G. S. PHIRI
SUPREME COURT JUDGE

(RETIRED)
.....
M. E. WANKI
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE