IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.22/2018
HOLDEN AT KABWE
(Criminal Jurisdiction)

BETWEEN:

RICHARD BWALYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: ***Chisanga, JP, Makungu, Kondolo JJA***

on 26th June, 2018 and 22nd day of November, 2018.

For the Appellant: Miss. K. Chitupila legal Aid Board
For the Respondent: Mrs. A.N. Sitali National Prosecutions Authority

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JUDGMENT

MAKUNGU, JA, delivered the Judgment of the Court.

Cases referred to:

1. *David Zulu v. The People (1977) ZR 151*
2. *Dorothy Mutale and Richard Phiri v. The People (1997) SJ 51 (SC)*
3. *Kalebu Banda v. The People (1977) ZR 169 (SC)*
4. *Mbinga Nyambe v. The People (2011) ZR 246 Vol. 1*
5. *Stanley Kasungani v. The People (1978) ZR 260*

Legislation referred to:

1. *Penal Code, Chapter 87 of the Laws of Zambia*
2. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

This is an appeal against conviction and sentence arising from a Judgment of the High Court given on 25th July, 2017. The appellant, Richard Bwalya, was convicted on one count of murder contrary to section 200 of the Penal Code and sentenced to death. The particulars of the offence were that the appellant on an unknown date but between 30th May, 2016 and 3rd June, 2016 at Kapiri Mposhi District of Central Province of the Republic of Zambia murdered Peter Mugondo.

The case for the prosecution rested on five witnesses: PW1 Memory Chibeluka Mugondo was the deceased's wife while PW2 Joseph Chibeluka was PW1's father. PW3 Peter Mugodo was the deceased's father. PW4 Charles Kalulu was the deceased's neighbour. PW5 was Ziyangwa Harrington a Police officer. The appellant gave evidence on oath in his defence and called a witness.

The material facts of the case and the evidence before the trial court were that the appellant visited the deceased and PW1 at their home on 30th May, 2016 around 15:00 hours and requested the deceased to accompany him to Mushimbili dam to retrieve fishing nets. The deceased initially refused but due to pressure from the appellant,

agreed to accompany him around 17:00 hours. When leaving, the deceased was wearing a pair of jeans shorts, a T-shirt, a wind breaker and shoes. He did not return home that night.

Early the following morning, PW1 proceeded to the dam to look for her husband. She found the appellant who told her that the deceased was probably at the cotton field. She went and checked at the cotton fields but did not find him.

On 1st June, 2016, around 14:00 hours, PW1 went to the dam with her Mother Elizabeth Ngandu to question the appellant about the whereabouts of the deceased. The appellant still denied knowing where the deceased was.

On 3rd June, 2016, PW1, PW2 and Elizabeth Ngandu went to the dam together to quiz the appellant about the same matter. The appellant only revealed to them that the deceased's body was in the dam after PW2's threat to report the matter to the police. The appellant then led PW1, PW1's mother, PW2 and PW3 to an anthill where he retrieved the deceased's shoes under some leaves and grass. Later that day, the appellant's father assisted by PW4 went

on to the dam with a canoe and retrieved the body of the deceased from the area where the appellant had directed them. They found the deceased's hands and legs tied up. PW2, PW3 and PW4 gave conflicting evidence regarding the materials that were used to tie him up. PW2 said his hands were tied with a mosquito net and his legs with a pair of trousers cut in half. PW3 stated that the body was tied up with a lot of clothes while the legs were tied up with a sweater using a sleeve on each leg. PW4 stated that the deceased's legs were tied with ropes and so was his neck.

It was also in evidence that the body was clad in various clothes such as two jerseys, 2 t-shirts and a work suit. Blood was oozing from the back of the head, mouth, nose and ears.

PW2 went and reported the matter to the police who came and arrested the appellant. The prosecution produced all the real evidence mentioned by the witnesses.

According to the post mortem report, the deceased died of severe head and neck trauma.

In his defence, the appellant admitted having gone fishing with the deceased on the material day and stated that it was not the first time that they had gone fishing together. He stated that around 01:00 hours, in preparation to go on the water, they both took off their shoes and tied their socks up with strings made out of a mosquito net to protect their feet from worms. The deceased took off his clothes and put on his fishing clothes that he used to leave at the fishing camp. According to the appellant, they had to layer their clothes for protection against the cold. They went and caught a lot of fish and as they were heading back to the camp, strong winds caused the canoe to capsize. He managed to swim ashore but he was unable to find the appellant on the land.

Between 04:00 hours and 05:00 hours, he decided to go and report the matter to his father. He and his father searched for the deceased at the fishing camp but could not find him. Then his father decided to inform the deceased's father (PW3) about the terrible ordeal they had been through. PW1 and PW3 arrived at the dam around 05:00 hours and he narrated to them how the canoe had capsized. He stated that it was on 2nd June, 2016 and not 30th

May, 2016 when he went to visit the deceased. Additionally, that the deceased's legs were not tied together.

Under cross-examination, the appellant stated that he was not present when the body was retrieved from the dam and therefore, he could not tell the state in which the legs were at that time. He denied having shown the deceased's family where the deceased's shoes were hidden.

In his Judgment, which is a subject of this appeal, the learned Judge found the prosecution witnesses credible. Further, he found that it was on 30th May, 2016 and not the 2nd day of June 2016, as claimed by the appellant, when the appellant visited the deceased, a known farmer to request for his company to the dam. He found that the appellant's persuasion of the deceased who was not a fisherman to accompany him to the dam to fish was not bonafide. The learned Judge dismissed the defence stating that the appellant's reaction when confronted by PW1 and others prior to the events of 3rd June, 2016 supports an inference of guilt for murder. He also found that the murder was premeditated.

At the hearing of the appeal, learned counsel for the appellant, Miss. Chitupila, relied on the heads of argument filed herein on 22nd June, 2018 wherein the sole ground of appeal is restated thus:

> ***"The learned trial judge erred in law and fact when she convicted the appellant on circumstantial evidence when an inference of guilt was not the only one that could reasonably be drawn from the facts."***

Counsel contends that the appellant gave a reasonable explanation as to how the deceased died and on the totality of the evidence, it was unsafe to convict him. That the circumstantial evidence did not take the case out of the realm of conjecture. To fortify this argument, she relied on the case of ***David Zulu v. The People*** [1] wherein the Supreme Court held among other things:

> **"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 the 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.

She further submitted that no one saw the appellant fighting with the deceased and that it was possible that the head injuries he sustained were from hitting his head against the boat when he fell out of the boat or hitting his head against something in the dam. That PW5 should have gone in the water to ascertain where the body was found.

She added that the post-mortem report did not contain the results of the examination but made reference to the "Coroners Authority for Burial". She referred us to the case of ***Dorothy Mutale and Richard Phiri v. The People*** [2] where the court held among other things:

i. ***Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such an inference.***

In light of the above-mentioned case, she urged us to find that two or more inferences are possible in this case and to adopt the one favourable to the appellant. She went on to refer to the case of ***Kalebu Banda v. The People*** [3] where it was held *inter alia*;

i. ***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.***

ii. ***In this context "available" means "obtainable", whether or not actually obtained.***

iii. ***The first question is whether the failure to obtain the evidence was a dereliction of duty on the part of the police which may have prejudiced the accused. When evidence has not been obtained in circumstances where there was a duty to do so - and a fortiori when it was obtained and not laid before the court - and possible prejudice has resulted, then an assumption favourable to the accused must be made.***

iv. ***The presumption will not necessarily be fatal to the prosecution case; "favourable" means "in favour of", not "conclusive". The extent of the presumption will depend on the nature of the evidence in question and the circumstances of the case, it; is an item of evidence presumed to exist, but its probative value will depend on the facts. The presumption is simply notional***

evidence to be considered along with all the other evidence in the case.

Ms. Chitupila stated that the post-mortem examination results were only available to the police and were not placed before the court. In light of the **Kalebu Banda case**, she asserted that had the results of the post mortem examination been produced, they would have been favourable to the appellant and that the cause of death remains unascertained. She therefore urged us to uphold the appeal, quash the conviction and set aside the sentence.

In response, learned counsel for the respondent Mrs. Sitali conceded that the evidence that the lower court relied upon was circumstantial. To buttress her position, she referred to the cases of ***David Zulu v. The People*** [1] ***and Mbinga Nyambe v. The People.*** [4]. She submitted that the lower court was on firm ground when it convicted the appellant on the strong circumstantial evidence. The fact that the deceased's legs were tied up renders the appellant's claim that he drowned improbable and the post mortem report negates the appellant's explanation of how the deceased met his

death as it discloses that the causes of death were severe head injuries and neck trauma and not drowning.

Mrs. Sitali further submits that the author of the post mortem report i.e Dr. Choe Sang Jin of Kabwe General Hopital merely repeated his findings made in the Coroner's Authority for Burial.

In conclusion, Mrs Sitali submitted that the observations on the body by the prosecution witnesses and the findings by the pathologist are inconsistent with the appellant's claim that the deceased drowned. The appellant had an opportunity to cause the death and in fact did so.

We have considered the record of appeal and the arguments advanced on behalf of both parties. The real question, as we see it, is whether the circumstantial evidence took the case out of the realm of conjecture, such that, it attained a level of cogency that could allow only an inference that the appellant is guilty.

First of all, even though the prosecution witnesses conflicting evidence as to what was used to tie the deceased up was not

resolved by the trial Judge, the view we take under the circumstances is that, it is indisputable that the legs and hands were tied up, notwithstanding the material that was used. The manner in which the body was tied up indicated foul play and criminal intention.

As regards the outcome of the post-mortem, the report produced by the prosecution indicates, among other things, that a post-mortem was conducted at Kapiri District Hospital on 7th June, 2016 on the body of Peter Mugondo who died 3 days before examination, i.e on 3rd June, 2016. A summary of significant findings at examination was: ***"According to the record in 'Coroners Authority for Burial' which was signed by Dr. Choe Sung Jun, his death was caused by severe head and neck trauma."***

We note that the author of the Report on Post Mortem examination was the same person who authored and signed the "Coroners Authority for Burial" unless, there were two pathologists bearing the same names, which is not evident. It was undisputed that PW3 witnessed the post mortem examination. We find that it is inconsequential that the Coroners Authority for Burial was not

produced. This being the case, we reject the appellant's advocate's submission that the Report on Post Mortem Examination did not reveal the cause of death.

According to the case of ***Stanley Kasungani v. The People*** [5]:

> ***"It is highly desirable, save perhaps in the simplest of cases, for the person who carried out a medical examination of a victim of an assault including a fatal assault and prepared the report to give verbal evidence in court."***

We are guided by this authority. However, even if the pathologist was not called, the post-mortem report sets out the cause of death in sufficient detail. In any case, the failure of the prosecution to call him, did not stop the appellant from invoking the provisions of section 191A of the Criminal Procedure Code and calling the pathologist.

Since a post mortem examination was actually conducted, the cause of death ascertained and clearly indicated in the report, we take the view that in this particular case, the appellant suffered no

prejudice regarding the fact that the pathologist and author of the report was not called as a witness.

It is clear from the Report on Post Mortem Examination that the deceased died on the day he was retrieved from the water i.e. 3rd June, 2016. This entails that he was alive until he was murdered on 3rd June, 2016 by the appellant and then thrown into the water to make it look like he had drowned. For the foregoing reasons, the defence was rightly rejected by the trial court.

In the case of ***Richard Phiri v. The people*** [2] relied upon by the appellant's advocates, the Supreme Court held among other things that:

> ***"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such an inference"***
> (underlined by the court for emphasis only)

In the present case, we do not find that two possible inferences could be drawn on the circumstances leading to death. The fact that the deceased was found with his legs tied rules out the

possibility that he could have drowned after the canoe capsized. In fact, had it been the case, the pathologist could have found drowning to be the cause of death but he did not.

As regards the inference that could be drawn on the evidence, we are of the considered view that the following strands of evidence culminate into cogent evidence that permitted only an inference of guilt: The appellant pressured the deceased to accompany him to the dam. The deceased did not return home that night as expected and he was nowhere to be found by his relatives. In the following couple of days, the appellant feigned ignorance of the deceased's whereabouts. Only when he was threatened to be taken to the police by PW3 did he decide to reveal the deceased's shoes which he had hidden on an anthill and to show PW1 and PW2 where the body could be found. The appellant's explanation that he and the deceased had layered their clothes because it was cold was rendered implausible, as the deceased's body was found bound on the legs and hands.

The test prescribed in the ***Dorothy Mutale*** [1] case has been satisfied and therefore the lower court was on firm ground when it

convicted the appellant as charged. The case of ***Kalebu Banda v. The People*** [3] is inapplicable.

In sum, the appellant created an opportunity for himself to murder the deceased for reasons best known to himself and he took that opportunity. The appeal fails and we therefore uphold the conviction and sentence.

Dated at Lusaka this 22nd day of November, 2018.

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F.M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO, SC
COURT OF APPEAL JUDGE