IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 47/2018**
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN

DAVISON MTONGA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
21 AUG 2018
REGISTRY
P. O. BOX 50067, LUSAKA

CORAM: **Chashi, Lengalenga and Siavwapa JJA**

On 26th June and 21st August 2018

FOR THE APPELLANT: MISS K. CHITUPILA, SENIOR LEGAL AID COUNSEL, LEGAL AID BOARD

FOR THE RESPONDENT: MISS A. M. SITALI –DEPUTY CHIEF STATE ADVOCATE, NATIONAL PROSECUTIONS AUTHORITY

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. **David Zulu v the People (1977) ZR 151**
2. **Saluweme v the People (1965) ZR 4**
3. **Yotam Manda v the People (1988-1989) ZR 129**
4. **Peter Yotamu Hamenda v the People (1977) ZR 184**
5. **Kalebu Banda v the People (1977) ZR 169**
6. **Mbinga Nyambe v the People (2011)1 ZR, 246**
7. **Dorothy Mutale and Richard Phiri v the People (1997) ZR**

This is an appeal against conviction on a charge of murder by the High Court and the pronouncement of the death sentence on the Appellant. On 22nd June 2018, Counsel for the Appellant filed into Court one ground of appeal and heads of argument. The sole ground of appeal states as follows;

> ***"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 inference which could reasonably be drawn from the facts."***

The uncontroverted facts of the case are that the deceased, a young woman in her early twenties, was found dead on 13th July 2017 in John Laing Compound. The previous night, the deceased had been drinking alcohol at a bar called African Braii where the Appellant was also drinking from on the same night.

The deceased's body was found the following day with bruises on the face, neck, back and the mouth in a makeshift stall with blood coming from the mouth.

The pathologist's report stated the cause of death as asphyxia due to strangulation and that the deceased had been sexually assaulted before her death.

The Appellant is linked to the murder through his having been in possession of the deceased's cell phone the following morning.

The learned trial Judge, after reviewing the evidence, and the law, rejected the Appellant's explanation of how he came into possession of the deceased's phone. She instead accepted the evidence by the prosecution which tended towards putting the Appellant at the scene of the murder at the material time and the way he dealt with the cell phone for the deceased as well as his conduct after the murder.

In the heads of argument, the Appellant has submitted that the evidence of PW12, the arresting officer regarding what the Appellant told him should be taken as it is to the effect that the Appellant picked up the phone about 15 metres from where the deceased's body was found without admitting killing the deceased.

We were urged to follow the decision in the case of *David Zulu v the People*[1] that warns of drawing wrong inferences from circumstantial evidence.

We were also urged to depart from the learned trial Judge's finding and accept that the Appellant's explanation of how he came into possession of the deceased's cell phone was reasonably possible. The case of *Saluweme v the People*[2] in which the Court of Appeal

held that; ***"If the accused's case is reasonably possible although not probable, then a reasonable doubt exists......"***
On drawing of inferences, we were referred to the case of *Yotam Manda v the People*[3] in which the Supreme Court of Zambia stated that a trial court has a duty to consider various alternative inferences that can be drawn where only evidence of possession is before the court.

It was submitted that on the evidence before the trial court, it's not only an inference of guilt that could be drawn as any other person from the African Braii bar could have murdered the deceased and that the Appellant could have given a wrong estimate of the time he picked up the phone.

The final submission related to dereliction of duty on the part of the police for failure to collect blood samples from the Appellant to match with the results of the swab taken from the deceased. Reliance was placed on the cases of *Peter Yotamu Hamenda v the People*[4] and *Kalebu Banda v the People*[5].

The gist of the Respondent's heads of argument is that the learned trial Judge was on firm ground given the sequence of events namely; the presence of the Appellant at the same bar as the deceased on the night she was murdered, the evidence of picking up of the deceased's phone near the place her body was found in the

same night, the quick disposal of the phone and the conduct of the Appellant leads only to an inference of guilt.

On the dereliction of duty, the Respondent submitted that a reasonable explanation was rendered for the failure and as such no dereliction of duty could be attributed to the investigating officer.

We have carefully considered the arguments advanced by both parties and the Judgment in the court below and the only question we need to pose and answer is: Did the circumstantial evidence placed before the court below attain the requisite standard to justify a verdict of guilty?

The learned trial Judge considered the set of facts before her namely, that the deceased, in the night in question, was at African Braii bar as well as the Appellant. This fact alone, does not connect the Appellant to the murder as the bar is open to eligible members of the public including the Appellant.

The second fact is that the Appellant allegedly picked up the phone that belonged to the deceased very close to the point where the body was found. This fact raises the question of how he found himself in the same place as the deceased just about the time of the murder. There is also the fact that the Appellant was untruthful about the time he allegedly picked up the phone which he said was around 19:30 hours when documentary evidence as well as PW9's

testimony show that the deceased had called PW9 at 22.44 hours on the same handset and the phone number belonging to the deceased.

The learned trial Judge also considered the fact that the Appellant and his co-accused led the police to two different spots from which the Appellant allegedly picked up the phone. The learned trial Judge found the Appellant to have consistently lied on those matters.

The other fact she considered is the quick manner in which the Appellant disposed of the phone to PW2 after telling him that, his co-accused had given it to him. This was inconsistent with his evidence that he had just picked it up from a place he showed the police. Finally, on the same night, the Appellant absconded from home deciding to spend the night at a friend's home.

In light of the above findings of fact, we cannot fault the learned trial Judge's branding of the Appellant as a liar and we agree that the inconsistencies in the defence story strengthen the circumstantial evidence.

We further accept that when all the facts are put together the learned trial Judge could arrive at only one inference; the inference that the Appellant was involved in the murder of the deceased.

The law on circumstantial evidence is well established in this jurisdiction, which is that, the said evidence should be such that it takes the case outside the realm of conjecture or mere speculation; see Mbinga Nyambe v the People[6] where the Supreme Court held inter alia that;

> ***"A trial 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."***

This is the same principle applied in the earlier case of *David Zulu v the People.*

The Appellant has submitted that, guilt was not the only inference that could be drawn from the circumstantial evidence before the court. It was in that regard suggested that the deceased could have been murdered by anyone who was at the African Braii, other than the Appellant.

The principle of alternate inferences in cases anchored on circumstantial evidence was well stated by the Supreme Court of Zambia in the case of *Dorothy Mutale and Richard Phiri v the People*[7].

In that case, the challenge was that the trial Judge did not find any link between the persons assaulted by the Appellants at the market and the person who was found dead on Bombesheni road. The trial Judge, nonetheless, went on to conclude that the person assaulted

at the market was the same one found dead later on Bombesheni road.

In allowing the appeal, the Supreme Court found that despite the possibility that the incident at the market and on Bombesheni road could have been related, there were other matters that created a lingering doubt which needed to be resolved in the Appellants' favour.

As a result, the Court held as follows;

> "***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 inference.***"

The possible alternate inference we are being drawn to in this case is that anyone from African Braii bar, other than the Appellant could have murdered the deceased. We do not find that as a possible inference in the face of the strong facts outlined earlier linking the Appellant to the murder.

The fact that the Appellant took possession of the deceased's phone shortly after the murder excludes the proposed inference. In fact, we take the view that in order for alternate inferences to exist, there must be circumstantial evidence on the record upon which such other inferences can be drawn. There is nothing in the evidence

upon which the learned trial Judge could have relied to draw an alternate inference linking anyone else who was at the African Braii Bar to the murder.

In the absence of such circumstantial evidence creating an alternate inference, no inference can be drawn.

The other point to note from the *Dorothy Mutale* case is that, such alternate inference must be favourable to the accused. It cannot be any other inference that can be drawn to defeat the inference of guilt.

We therefore hold that even if there could be drawn such an inference as proposed by the Appellant, the same would not be favourable to the Appellant as the facts linking him to the murder exclude the proposed alternate inference.

We therefore uphold the learned trial Judge in the court below and dismiss the appeal accordingly.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE