

FILE

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)

APPEAL 21/2018

BETWEEN:

THE PEOPLE

APPELLANT

AND

FELIX MUCHELENG'ANGA

RESPONDENT



CORAM: Mulongoti, Sichinga and Ngulube, JJA

On 26th June, 2018, 21st August, 2018 and 27th
September, 2018

*For the Appellant: Ms. P. Nyangu Senior State Advocate-National
Prosecution Authority*

*For the Respondent: Ms. E.I Banda Senior Legal Aid Counsel- Legal
Aid Board.*

J U D G M E N T

MULONGOTI,JA, *delivered the Judgment of the Court*

Cases referred to:

1. George Musupi v The People (1978) ZR 271 (SC)

2. **Dorothy Mutale and another v The People SCZ selected Judgment Number 51/1997**
3. **Chimbini v The People (1973) ZR 191**
4. **Abel Banda v The People (1986) ZR 105 (SC)**
5. **Ilunga Kabala and John Masefu v The People (1981) ZR 102 (SC)**
6. **Liato v the People SCZ Appeal Number 291/2017**
7. **Davies Jokie Kasote v The People (1977) ZR 75 (SC)**
8. **David Zulu v The People (1977) ZR 151 (SC)**

Legislation referred to:

1. **The Court of Appeal Act Number 7 of 2016**

This is an appeal by the State against the acquittal of the respondent Felix Muchelenga'nga. The respondent was tried in the High Court at Kabwe on a charge of murder. The particulars of the offence alleged that on 12th July 2013 at Mumbwa in the Mumbwa District of the Republic of Zambia, Felix Mucheleng'anga murdered Pretty Chinabe (also referred to as the deceased). The deceased was a child aged 3 years and 11 months.

The evidence before the trial court was that PW1 (Tapiwa Chinabe), the respondent's father in law, had left the deceased with Sila Chimuti, Nyarazi Chimuti, Amai Janet, the respondent and his wife then he went for a church camp meeting. While at the camp meeting, he received a phone call that the deceased had gone missing for five days. After he returned to the village, he was told by Moses Chinabe that Felix Mucheleng'anga led them to the scene where the deceased was found dead in a ditch at a hillside. Later PW1 and others led by Felix Mucheleng'anga went to the scene which was about 200 metres from the village and found the child buried in a ditch at the hillside as reported by Moses Chinabe. They took Felix Mucheleng'anga to the police. Felix Mucheleng'anga later led the police to the scene.

PW2 (Moses Chinabe) testified that on 21st July 2013, his brother PW1, alerted him about the disappearance of the deceased. They launched a search party and consulted witchdoctors, to no avail. Then someone in the village told them that Felix Mucheleng'anga was in the habit of defiling children wherever he stayed. PW2 then tricked Felix Mucheleng'anga by telling him a lie that the

witchdoctor, using a mirror, had shown the family what he was doing to the child.

This is how Felix Mucheleng'anga led PW2 and other people to the scene and showed them where he had buried the child in a ditch, covered with sand and leaves. They asked him to remove the sand and leaves and as he did that, PW2 noticed a red jersey the child was wearing. Later the police and others were led to the scene by Felix Mucheleng'anga.

PW3 Veronica Lina Mazo the mother to the deceased informed the Court that the deceased was aged 3 years and 11 months. She said she left the child with her mother as she had to take another child to the clinic. She was told that the child had gone missing while at the clinic. They searched for a week.

Joyce told her that Felix Mucheleng'anga whom they were keeping was in the habit of defiling children and they should chase him. Felix Mucheleng'anga was staying 30 meters away from her mother's house. PW2 offered to talk to Felix Mucheleng'anga hoping

to gather some information. Later Felix Mucheleng'anga led PW2 and others including herself to the scene. She observed that the deceased's private parts were cut and bloody. Felix Mucheleng'anga uncovered the body and PW1 took the body to the hospital. In cross-examination she admitted that she was not present when PW2 spoke to Felix Mucheleng'anga, and that information about Felix Mucheleng'anga defiling children was just a rumour.

According to PW4 the arresting officer, Felix Mucheleng'anga led police to the crime scene where the deceased's body was found partially buried in a ditch. Postmortem was conducted which revealed that the victim was defiled and strangled. The body had not decomposed but had blood and strangle marks. According to information he gathered, the child was at PW1's house when she went missing and was in good health.

In cross-examination he said he was aware that Felix Mucheleng'anga was amongst those searching for the child. He was not aware that it was PW1 and the witchdoctor who located the body. When re-examined he said Felix Mucheleng'anga was

interviewed by the deceased's family and that's how he took them to the scene.

When called upon to defend himself, the respondent Felix Mucheleng'anga said he was beaten by PW2 with a metal bar and forced to join the search party on the fifth day of the child missing.

His aunt Janet suggested that they consult a witch doctor. It was the witch doctor who led them to the crime scene where the body of the deceased was found.

The body was found in a ditch and it was removed by PW2 and taken to the mortuary. He denied leading the police to the crime scene but admitted that he was present with his in-laws when they went to the crime scene. He said it was Forward Chinabe who led the police to the scene but only he was arrested.

He said the deceased was staying at her grandmother's house and he only saw her once. His village was 10 kilometers away. He denied strangling and killing the child.

The trial Judge found that evidence of PW1, PW2 and PW3 who are in-laws to the respondent was corroborated by PW4 and therefore safe to rely on. The passage from the case of **George Musupi v The People**¹ was relied upon that:

"...today the same principles must be applied to the approach of a witness with a possible bias, such as a relative of an employee... the critical consideration is not whether the witness does in fact have an interest or a purpose of his own to serve, but whether he is a witness who, because of the category into which he falls or because of the circumstances of the case, may have a motive to give false evidence. Once in the circumstances of the case this is reasonably possible,... the danger of false implication is present and must be excluded before conviction is held safe."

The Judge also found that there was no evidence that the respondent was with the deceased on the date in question. She concluded that there were no eye witnesses to the crime and thus the evidence against the appellant was circumstantial.

She reasoned that though it was possible that the respondent committed the offence, the evidence presented before her did not extinguish the possibility of a wrong inference. She opined that

there was a possibility that the deceased could have been attacked by other people after she strayed out of the house. The trial Judge also found that there was no evidence linking Felix Mucheleng'anga to the crime other than the allegation, which PW3 admitted was a rumour, to the effect that he was in the habit of defiling children. She also observed that since the witch doctor was not called to testify, it left a gap in the prosecution's case.

The trial Judge noted that where two or more inferences were possible, the Court should adopt one favorable to the accused as elucidated in the case of **Dorothy Mutale and another v The People**²

She found that on the evidence before her an inference of guilt is not the only one that could be drawn as was held in **Chimbini v The People**³.

The Judge concluded that the prosecution failed to prove its case beyond reasonable doubt and acquitted the respondent.

This prompted the prosecution to launch an appeal before us on one ground to the effect that the trial Judge misdirected herself when she held that an inference of guilt is not the only one that could be made on the evidence before her.

Ms. Nyangu, the Senior State Advocate, who appeared for the appellant also filed heads of argument in support of the appeal. She submits that the only possible inference in this case is that the respondent Felix Mucheleng'anga murdered Pretty Chinabe. PW2's testimony that Felix Mucheleng'anga led him to the scene where he had buried Pretty Chinabe, amounts to a confession. Relying on the Supreme Court decision in **Abel Banda v The People**⁴, it is argued that a confession is admissible in proving a case against an accused if made to a person not in authority.

Additionally, the fact that PW2 tricked the respondent which made him lead to the recovery of the body was an odd coincidence, which corroborates the fact that Felix Mucheleng'anga murdered Pretty Chinabe.

The case of **Ilunga Kabala and John Masefu v The People**⁵ was cited as authority that odd coincidences, if unexplained may be supporting evidence. Thus, the trial Judge erroneously concluded that it is a possibility that the deceased was abducted by other people as it is an explanation that cannot reasonably be true. She also submitted that the prosecution's failure to call the witch finder was not fatal as the evidence adduced against the respondent was so cogent that no further evidence was required to corroborate it.

We are urged to quash the decision of the trial Court and convict Felix Mucheleng'anga of murder.

The respondent's counsel Ms. Banda argued the appeal viva voce. She submitted that the appeal is incompetently before us in terms of **section 14(4) of the Court of Appeal Act (The Act)**. Counsel amplified that **section 14(4)** allows the prosecution (State) to appeal on a point of law only. The case of **Liato v The People**⁶ was cited as authority that the State can only appeal on a point of law and not a question of fact.

The appellant's ground of appeal appears to be on findings of fact as inferences made by a trier of facts are findings. The trial Judge concluded that there is a possibility that the deceased was abducted, which was a finding of fact.

It was the further submission of counsel that should we not agree with her arguments on **section 14(4) of the Act**, we should still dismiss the appeal because there was a possibility of several other inferences. The evidence was circumstantial and the Judge correctly applied the cases of **Chimbini v The People**³ and **Dorothy Mutale and another v The People**².

In response, Ms. Nyangu, submitted that the appeal is competently before us as the ground of appeal is premised on a point of law in accordance with **section 14(4)**. According to counsel, in acquitting the respondent the trial Judge relied on the passage from the case of **Dorothy Mutale and another v The People**² that where two or more inferences are possible, the Court should adopt one favourable to the accused. That this is a point of law and thus the

appeal is competent. The evidence against the respondent amounted to a confession, therefore, the appeal should be allowed.

We have considered the arguments by counsel. The cardinal issue this appeal raises is whether the prosecution proved its case beyond reasonable doubt in light of the evidence from the prosecution witnesses that the respondent led them to the scene where he buried Pretty Chinabe, after being tricked by PW2.

Before we consider the issue, we will deal with the respondent's counsel's argument that the appeal is incompetent. Indeed **section 14 (4) of the Act** provides that the appellant (Director of Public Prosecutions) may appeal to this Court on a point of law.

In **Davies Jokie Kasote v The People**⁷, the Supreme Court elucidated that a finding of fact becomes a question of law when it is a finding not supported by the evidence or when it is one made on a view of the facts which cannot reasonably be entertained. The appellant here is contending that the finding by the trial Judge that the appellant is not guilty because there are several inferences

which can be drawn on the facts of this case, is a finding which is not supported by the evidence considering his confession to PW2 and others. Furthermore, it is a finding made on a view of the facts which cannot reasonably be entertained.

We find that the appeal is therefore on a point of law and is competently before us.

Essentially, the appellant is contending that the trial Judge misapprehended the facts and evidence before her, when she acquitted the respondent. It is argued that the respondent confessed to PW2 and others and even led them to the crime scene. The evidence on record also reveals that the respondent later led the police to the scene where the body of Pretty Chinabe was found. The body was found buried in a shallow grave covered with leaves and sand.

The evidence, which even the trial Judge accepted, is such that PW2 (the respondent's father-in-law) tricked him by telling a lie to the effect that the witchdoctor, using a mirror had shown them

what the respondent was doing to Pretty Chinabe. The respondent then led them to the bush and then a hill, where they found Pretty Chinabe dead and buried. After this, they surrendered him to the police. He again led the police and uncovered the ditch where Pretty Chinabe was buried. Her body was removed and taken to the mortuary.

We note that the trial Judge found that the evidence before her was circumstantial. She referred to the case of **David Zulu v The People**⁸ where the Supreme Court enunciated the all embracing principle on circumstantial evidence that:

"(i)it is a weakness peculiar to circumstantial evidence that by its very nature, it is not direct proof of a matter in issue but rather it is proof of facts not in dispute 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."

As alluded to, the trial Judge accepted the evidence of PW2 and in fact said it was safe to rely on. PW2 testified that he tricked the respondent to say the witch doctor had shown the family what he was doing to the deceased. All the prosecution witnesses said they had earlier consulted witch doctors but to no avail. It was only after PW2's trick that the respondent led them to the scene. This was the evidence which the Court accepted and found that it was corroborated by PW4.

We are of the considered view that the circumstantial evidence before the trial Judge could only lead to an inference of guilt. The Judge misdirected herself when she found that several inferences are possible including the deceased being abducted by other people. These inferences are not supported by the evidence before her at all. We are therefore, entitled to interfere with the findings by the court below. We fail to appreciate how the trial Judge ignored the evidence of leading. The respondent's story that the witchdoctor led

the people to the place where Pretty Chinabe's body was found was clearly an afterthought. The prosecution witnesses were never cross examined on this issue which only arose during his testimony at defence stage.

Thus, the finding that because the witch doctor was not called it left a gap in the prosecution's case is also not supported by the evidence. The evidence was that several witch doctors were consulted but they failed to resolve the case of the missing child. It was after PW2 tricked the respondent that he led to the recovery of the body of the missing child. We must add that the reasoning that the deceased was possibly abducted was equally not supported by the evidence. It is too much of a coincidence that the respondent knew where to find the body if he had nothing to do with the murder and if at all Pretty Chinabe was abducted by unknown people.

The circumstances of this case leave us with no reasonable doubt that the respondent committed the crime.

Though, the evidence was circumstantial it had succeeded to take the case out of the realm of conjecture and it attained such a degree of cogency to permit only an inference of guilt. Had the trial Judge properly considered the circumstantial evidence before her, she would have come to the inescapable conclusion that it could lead only to an inference of guilt. A search party had failed to locate the body of the deceased and they only found it after the respondent led them to where it was buried. In the circumstances of this case, it is inconceivable that the respondent would have known where the body was buried if he had nothing to do with the deceased's disappearance.


The Supreme Court elucidated in **David Zulu v The People**⁸ that a trial Judge should guard against drawing wrong inferences from the circumstantial evidence at his or her disposal.

We opine that in *casu*, the trial Judge drew the wrong inferences and acquitted the respondent yet the circumstantial evidence before her had taken the case out of the realm of conjecture to lead only to an inference of guilt. The appeal must succeed.

In these circumstances the trial Judge misdirected herself by acquitting the respondent. We set aside the acquittal of Felix Mucheleng'anga and substitute it with a conviction of murder. We find no extenuating circumstances and thus sentence him to death.


J.Z. MULONGOTI
COURT OF APPEAL JUDGE


D.L.Y. SICHINGA
COURT OF APPEAL JUDGE


P.C.M. NGULUBE
COURT OF APPEAL JUDGE