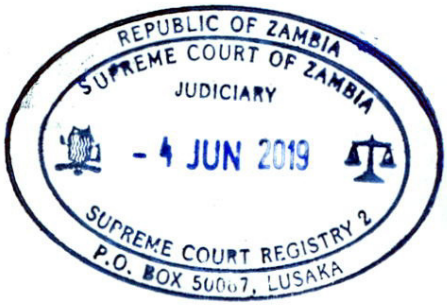
IN THE SUPREME COURT OF ZAMBIA Appeal No. 35/2018
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



B E T W E E N:

LATINS LUNGU **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: **Phiri, Muyovwe and Chinyama, JJS**
on 7th May, 2019 and 4th June, 2019

For the Appellant: Mrs. M.K. Liswaniso, Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. B. Mwewa, Senior Legal Aid Counsel, National Prosecutions Authority

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **David Zulu vs. The People (1977) Z.R. 151**
2. **Dorothy Mutale and Another vs. The People (1995-1997) Z.R. 227**
3. **Chabala vs. The People (1976) Z.R. 14.**
4. **Banda vs. The People Appeal No. 30/2015**
5. **Freeman Chilao Chipulu vs. The People CAZ. 37/38**
6. **Peter Yotamu Haamenda vs. The People (1977) Z.R. 184**
7. **Kalebu Banda vs. The People (1977) Z.R. 169**
8. **Charles Lukolongo vs. The People (1986) Z.R. 115**

9. **Mwanza and Others vs. The People (1977) Z.R. 221**
10. **Wamulume Myutu and Another vs. The People Appeal No. 23/2016**

The appellant was found guilty of the murder of his wife, Fridah Mwale (hereinafter referred to as "the deceased".)

The summary of the evidence in the court below was that on the 19th December, 2011 the appellant woke up in the morning only to find the deceased had died in the night. He found her lying on the floor in the sitting room of their one roomed house. The deceased had a rope around her neck and there was another rope hanging from the roof and the appellant concluded that she had committed suicide. She left a suicide note in an exercise book in which she exonerated the appellant. The appellant quickly alerted the neighbours and the relatives to the deceased and subsequently the matter was reported to the police.

PW1 was the appellant's brother-in-marriage as he was married to the deceased's younger sister and he had known the appellant for about 15 years. He explained that the couple were married for about 10 years and had one child. The appellant called on him early that morning and informed him that his wife had

committed suicide by hanging herself. PW1 asked the appellant whether they had quarreled and the appellant responded in the negative. As they proceeded to the appellant's house, the appellant handed him the suicide note. Along the way, they met a neighbor (PW2's husband) who accompanied them to the appellant's house where they found the deceased lying on the floor facing upwards. PW1 observed that the deceased had a rope around the neck and there was a rope hanging from the roof. Everything in the house was in order.

In cross-examination PW1 admitted that he was aware that the deceased was HIV positive and that she had attempted suicide in 2008. Further, that at one time the appellant had a girlfriend and the deceased was worried that the appellant would leave her because of her HIV status.

PW2 was a neighbour and friend to the deceased who had the previous night spent time with the deceased watching TV until the appellant arrived home. She later left for her own home. In the morning around 0500hours her husband went jogging but returned after a few minutes in the company of the appellant and his child.

The appellant explained that there was a problem at home. Together with her husband, they accompanied the appellant to his house where she saw the body of the deceased in the sitting room. According to PW2 the deceased did not complain about any issue health wise or otherwise the previous night.

The evidence of PW3, an uncle to the deceased was that he interviewed the appellant as to what had happened to the deceased and his explanation was that on the material night, he went to sleep leaving her watching TV. As he slept he was awakened by the sound of a belt. He asked her what she was doing and she claimed she was looking for an MTN card. He called her a prostitute and went back to sleep and when he woke up in the morning he found her dead. The witness stated that during the funeral the appellant urged them to bury quickly as there was no food in the house.

The rest of the witnesses testified to attending the post-mortem examination and the police witnesses narrated how they found the deceased's body in the house and their evidence was substantially the same as that of PW1. According to the police, they suspected foul play especially that the couple lived in a one roomed

house and it was unbelievable that the appellant did not hear anything in the night.

The learned trial judge found that the appellant had quarreled with his wife; that he had the opportunity to kill her and that the death was not a suicide as evidence was not consistent with suicide. She was satisfied that the circumstantial evidence was cogent in terms of **David Zulu vs. The People.**[1] She convicted the appellant and sentenced him to death.

Learned Counsel for the appellant, Mrs. Liswaniso filed three grounds of appeal couched as follows:

1. **The learned trial judge erred in law and fact when she found as a fact that there had been a quarrel between the Appellant and his deceased wife, which finding was not supported by the evidence on record.**
2. **The learned trial judge erred in law and in fact by holding that, the Appellant had the opportunity to kill his deceased wife and did in fact kill her and attempted to make it look like she had committed suicide.**
3. **The learned trial judge erred in law and in fact when she held that the evidence adduced by the state was so cogent and compelling that there was no other rational hypothesis other than that the Appellant killed his deceased wife.**

In her filed submissions, Counsel for the appellant argued in ground one that the trial court fell in grave error when she found as a fact that the appellant quarreled with his deceased wife prior to her death based on the evidence of PW5 the arresting officer who informed the court that the appellant told him that he had quarreled with his wife. Counsel contended that other than PW5's evidence which is his word against the appellant's, there was no evidence from the neighbours to the effect that they heard the appellant quarrelling with his wife especially that the couple rented a one roomed house.

In ground two, it was submitted that the learned judge made assertions in her judgment which were unfounded. Counsel cited a passage in the judgment where the learned trial judge stated:

> **"in a normal case of hanging, one would expect to find the tongue protruding from the mouth as air is cut off. In this case, the post-mortem report shows that the mouth and tongue were intact. This is not consistent with hanging."**

Further, that the judge stated that:

> **"just like it is not consistent that a person who has hang themselves would have a mark at the back of the neck, when there is a deep ligature under the chin and the abrasions and bruises would have been localized."**

According to Counsel, these findings should have been made by the doctor who is an expert in the field. However, the doctor was not called as a witness which was a serious dereliction of duty on the part of the prosecution. It was contended that the post-mortem report is clear as to the cause of death which was Asphyxia due to hanging which was due to multiple abrasions and bruises on the body and that again, the doctor was better placed to explain the cause of the abrasions and bruises. It was submitted that the suicide note was clear in its contents and the prosecution did not challenge that it was authored by the deceased. Citing the case of **Dorothy Mutale and Another vs. The People**[2] it was argued that in the case in *casu*, there were two or more inferences such as that the deceased committed suicide by hanging herself or the appellant could have caused her death.

In ground three, it was submitted that the explanation given by the appellant regarding the events leading to the deceased's death was reasonably true and that there is no obligation on the appellant to prove his explanation. In support of her argument Counsel relied on the case of **Chabala vs. The People**.[3] It was

submitted that the prosecution evidence fell short of the threshold in the case of **David Zulu vs. The People**. Counsel prayed that we quash the conviction and set the appellant at liberty.

On behalf of the state Mr. Mwewa the learned Senior State Advocate did not support the conviction.

Mr. Mwewa in his heads of argument in response submitted that the conviction was unsafe in view of the following: there was no evidence of malice on the part of the appellant; the altercation that the lower court concluded was a fight was according to the record, limited to words' "you are a prostitute;" there was evidence of an attempted suicide by the deceased which was allegedly thwarted by the appellant and the postmortem examination report showed injuries that were consistent with hanging. Counsel relied, *inter alia*, on the cases of **Banda vs. The People**,[4] **Dorothy Mutale and Another vs. The People**[2] and **Freeman Chilao Chipulu vs. The People** [5]

We have considered the arguments by learned Counsel. We will deal with all the grounds of appeal together. From the outset we must commend the state for conceding that the conviction in

this case was unsafe. It is common cause that this case stands heavily on circumstantial evidence and the case of **David Zulu** has laid the standard required for such evidence to sustain a conviction. We held in that case that 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. The question is whether the prosecution proved its case beyond reasonable doubt having regard to the circumstantial evidence relied upon by the trial court.

In this case, the prosecution evidence painted a picture of the deceased enjoying a peaceful evening with her friend and neighbour PW3 with whom she watched a TV show. The appellant arrived and found the two women watching TV. He retired to bed with the child leaving the two women watching TV. In fact according to PW3 the deceased encouraged her to stay a while longer but she declined and left. In her evidence, PW3 did not disclose that she observed anything unusual in the house or between the couple. Sadly, the deceased was found dead the following morning in unexplained circumstances.

Having perused the evidence in the court below, we take the view that there were a lot of unanswered questions which should have remained lingering in the mind of the learned trial judge. First of all, the suicide note was in clear terms that the deceased committed suicide and the note stated that the appellant, as husband, should not be troubled. It appears the prosecution doubted the authenticity of the note, yet the investigations officer found it unnecessary to involve a handwriting expert to rule out that it was the appellant who had authored the suicide note. In **Haamenda vs. The People**[6] we held that:

> **"Where the nature of a given criminal case necessitates that a relevant matter must be investigated but the Investigating Agency fails to investigate it in circumstances amounting to a dereliction of duty and in consequence of that dereliction of duty the accused is seriously prejudiced because evidence which might have been favourable to him has not been adduced, the dereliction of duty will operate in favour of the accused and result in an acquittal unless the evidence given on behalf of the prosecution is so overwhelming as to offset the prejudice which might have arisen from the dereliction of duty. "**

In **Kalebu Banda vs. The People**[7] we held *inter alia* that:

> **(4) 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

(5) 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

In the above cited authorities, we pronounced ourselves on the need for the police (prosecution) to obtain relevant evidence and avail it to the court to avoid any prejudice to the accused (and the prosecution) and it must be borne in mind that justice is for all the parties.

The failure to have the note examined by a handwriting expert amounted to dereliction of duty on the part of the police and, therefore, it must be presumed that had the suicide note been examined by a handwriting expert, it would have been found that

the deceased wrote it and the appellant would have been exonerated.

Secondly, the postmortem examination report revealed that the cause of death was asphyxia due to hanging due to multiple abrasions and bruises on the body. The evidence of the investigations officer was that he doubted the appellant's story that he woke up in the morning to find his partner had died especially that the couple lived in a one roomed house. Looking at the peculiar circumstances of this case, it was important for the prosecution to call the pathologist who conducted the postmortem examination to explain his findings. Certainly, it is possible that the deceased could for reasons known to herself have taken her own life, hence the suicide note or the appellant could have killed her and authored the note or they could have fought and later while he slept she could have written the suicide note and hanged herself. We agree with Mrs. Liswaniso that the learned trial judge misdirected herself when she concluded that because the appellant's tongue was not protruding this meant that she had not committed suicide. We must emphasize that the pathologist should

have been called to explain the cause of death, that is, whether the deceased hanged herself or someone strangled her and made it look like a suicide. In **Charles Lukolongo vs. The People**[8] it was held that if medical evidence is available it should be called, rather than a court relying on its own opinion. Further, in the case of **Mwanza and Others**[9] which we referred to in our recent decision in the case of **Wamulume Miyutu and Another vs. The People**[10] we stated that:

> **" There may be cases in which the medical report will be sufficient to supply this information without it being necessary to call the doctor, but our experience is that medical reports usually require explanation not only of the terms used, but also of the conclusions to be drawn from the facts and opinions stated in the report. It is therefore highly desirable, save perhaps in the simplest of cases, for the person who carried out the examination in question and prepared the report to give verbal evidence in court; certainly the doctor should have been called in the present case".**

This is the position in this appeal. The expert evidence, though it is an expert's opinion was crucial in the face of evidence that the deceased had previously attempted to take her own life on account of her HIV status.

We take the view that the investigations officer in this matter took a casual approach and looked at this case as an open-shut case which is most regrettable. Such an attitude can lead to an innocent person being convicted or a guilty person can escape the long arm of the law.

In short, all these unanswered questions could have been answered had the prosecution called the pathologist and had they also sought the assistance of a handwriting expert.

Due to the gaps in the evidence, the learned trial judge ended up making assumptions which were not supported by the evidence on record as pointed out by Counsel for the appellant.

Clearly, the evidence on record raised strong suspicion of the possibility of foul play. However, strong suspicion is not the standard of proof in criminal matters. We held, *inter alia*, in **Dorothy Mutale and Another vs. The People** 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 inference".**

As we have stated herein that the appellant was guilty was not the only reasonable inference in this case and authorities abound that in such cases the accused must be set at liberty. We find merit in this appeal and we set aside the conviction of murder and acquit the appellant forthwith.

Appeal allowed.

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G.S. PHIRI
SUPREME COURT JUDGE

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E.N.C. MUYOVWE
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE