IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 171/2017
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

KANGWA ESTHER ROZARIA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Chisanga, JP, Mchenga, DJP, Makungu, Chashi, Chishimba, Mulongoti, Sichinga, Kondolo, Lengalenga, Siavwapa and Majula, JJA

On 20th February 2018, 25th September 2018 and 22nd January 2019.

For the Appellant: S. Lungu SC with N. Ngandu, Shamwana and Company
For the Respondent: M.K. Chitundu, Deputy chief State Advocate with S. Simwaka, State Advocate, National Prosecution Authority

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J U D G M E N T

Cases referred to:

1. **The People v Njovu [1968] Z.R. 132**
2. **R v Baskerville [1916] K.B. 658,**
3. **Nsofu v The People [1973] Z.R. 287**
4. **Director of Public Prosecution v Esther [1972] 3 AII ER 1056**

5. George Musupi v The People [1975] Z.R. 271

6. David Dimuna v The People [1988-1989] Z.R. 199

7. The Attorney General v Achiume [1983] Z.R. 1

8. Mwape v The People [1976] Z.R. 160

9. Mangomed Gasanalieu v The People [2010] Z.R. Vol.2 132

10. Lupupa v The People [1977] (Reprint) Z.R. 51

11. Mbinga Nyambe v The People [2011] Z.R. Vol. 1 246

12. Dorothy Mutale and Richard Phiri v The People [1995-1997] Z.R. 227

13. Maseka v The People [1972] Z.R. 9

14. Saluwema v The People [1965] Z.R. 4

15. Phiri and Others v The People [1973] Z.R. 47

16. Bwanausi v The People [1976] Z.R. 103

17. David Zulu v The People [1977] Z.R. 151

18. Sakala v The People [1980] Z.R. 205

19. Ilunga Kabala and John Masefu v The People [1981] Z.R. 102

20. John Mkandawire and Others v The People [1978] Z.R. 46

21. Nalyela v The People Appeal No. 8 of 2016

22. Ackson Mwape v The People SCZ Appeal No. 132/2010

23. Saidi Banda v The People SCZ Appeal No. 30 of 2015

24. Ezious Munkombwe and Others v The People CAZ Appeals No. 7,8 and 9 of 2017

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**

Chisanga, JP: I have had the advantage of reading the judgment prepared by my learned brother, the Deputy Judge President. For the reasons which he gives, which I entirely accept, I would dismiss this appeal.

Mchenga, DJP: The appellant appeared before the High Court charged with one count of the offence of murder contrary to **section 200 of the Penal Code**. The particulars of offence alleged that on 18th October 2015, she murdered Owen Lungu, who was her husband. She denied the charge and the matter proceeded to trial.

The evidence against her was that on 18th October 2015, after 15:00 hours, the appellant's husband and her brother-in-law, Voggy Chuuya, started taking alcoholic

beverages. Around 18:00 hours, they moved to a Lodge in Lusaka's Avondale area, where they continued drinking and they were joined by the appellant and her sister, the wife to Voggy Chuuya. At some point, the appellant's husband received some phone calls which she queried and she accused him of talking to prostitutes. She even attempted to grab the phone. The appellant then left the lodge and went home. She returned to the lodge after thirty minutes but did not stay long.

Voggy Chuuya told the court that they continued drinking until 23:00 hours, when they left the lodge and he dropped the appellant's husband home. He said although the appellant was drunk, he was not as drunk as he was. Just when he got home, he received information that the appellant's husband had fallen into the bathtub.

According to Nzali Lungu, the appellant's daughter, that night, her father came home between 21:00 hours and 24:00 hours. He had a chat with her and her sister in their bedroom and he appeared drunk because he was repetitive.

Between 22:00 hours and 23:00 hours she heard her mother, the appellant, call out. She woke up and found her shaking her father in the bathroom. He was sitting with his head tilted at an angle. She was sent to call for help and the neighbours came and assisted. Her evidence was confirmed by the neighbour, Christabel Ngoma, who told the court that they found the appellant's husband in the bathtub, with his head near the taps and he had a bit of blood on the neck. With the help of others, they moved him to the sitting room.

The other prosecution evidence came from Aaron Banda, a worker at Banda Memorial Funeral Parlour. He told the court that when they picked the appellant's husband's body, on 18th October 2015, they noticed blood coming from the back of the head. The testimony of Solomon Gregory Phiri was that his son was buried at Mutumbi Cemetery and that he led the police to the marked grave where the body was exhumed and he identified it for post-mortem. On the other hand, the evidence of the arresting officer, Inspector Lewis Mwila, was that on 19th November 2015,

Solomon Gregory Phiri led them to the Memorial Park where the body was exhumed and post-mortem conducted.

According to Dr. Musakhanov, the pathologist who carried out the post-mortem, the cause of death was a head injury. The appellant's husband had suffered precranial haematoma of the frontal bone. He also observed haematoma to the brain tissue. He said it was caused by trauma on the head. He said a beating or accident can cause trauma to the head. He also said if a person fell and hit his face, he could not suffer the trauma that the appellant's husband suffered. He also ruled out the possibility that the injury could have occurred after death.

There was also evidence from Edward Chanda, a taxi driver, who told the court that the appellant's husband had previously informed him that the appellant had been violent towards him. He showed him wounds that he had suffered at the hands of the appellant.

In her defence, the appellant told the court that on the material day, she joined her husband around 19:00 hours. He was drinking whisky. She denied the claim that they quarrelled over the phone call that he received but admitted asking him who had called him. Shortly thereafter, she went home to pick up some clothes for her sister. On her return, she did not stay long, she left her husband behind because he was dilly dallying.

Though she left her husband at the drinking place, he arrived soon after she reached home. He went into their daughter's bedroom while she took off the trousers that she was wearing and soaked it in water. She then started ironing clothes for the following day. When she finished, she found her husband sleeping and joined him.

Whilst asleep, she heard a sound like something had fallen in the bath tub. When she got into the bathroom, she found her husband had fallen. He was breathing heavily and his head was by the taps, while his legs were on the other side. The palms and feet had become purple. She

failed to wake him up. She denied placing her husband into the bathtub. She said when she checked his forehead, it was okay.

William Ngoma, who was the appellant's neighbour and Christabel Ngoma's husband and Francis Xavier Mupinde, the appellant's father, also gave evidence as defence witnesses. According to William Ngoma, when he was called, he found the appellant's husband in the bathtub with his head between the taps. He said they only managed to lift him out of the bathtub with the help of a security guard. Francis Xavier Mupinde's evidence was that when he saw his son in law's body at the hospital, it was face up and nothing stood out.

After considering the evidence before her, the trial judge found that it was not in dispute that on 17th October 2015, the appellant's husband started drinking alcoholic beverages from around 16:00 hours. It was also not in dispute that he died in the night between 17th and 18th October 2015.

She accepted the prosecution evidence that while at a lodge, the appellant and her husband differed over phone calls that her husband had received. This left the appellant upset and she left the lodge but returned shortly. The appellant then left again and went home. She also accepted Eddie Chanda's testimony that the appellant's husband told him that she used to fight him for going home late, after she found it credible.

The trial judge also found that the appellant's husband talked to his daughters for about twenty to thirty minutes when he got home. She accepted the appellant's evidence that her husband was too heavy for her to carry him into the bathtub. She accepted the pathologist's evidence that the injury that caused Owen Lungu's death was the precranial haematoma of the frontal bone that he had suffered.

The trial judge also accepted the pathologist's evidence that the injury could not have been caused by a fall on the face. Having visited the house, she ruled out the

possibility that he fell in the bathtub or that the taps on the bathtub inflicted the injuries the witnesses saw on the neck. She concluded that the appellant inflicted the injuries that her husband suffered.

She also considered the possibility that the appellant either attacked her husband in the bedroom and led him into the bathroom or attacked him while he was in the bathroom and placed him between the taps after noticing the bleeding. She concluded that it was more probable that the appellant attacked her husband in the bedroom and led him into the bathroom; she then arranged the body in the bathtub. Thereafter, she washed her trousers because there was blood on it.

The trial judge found that the appellant had the motive and opportunity to cause her husband's death. She found that the only inference that could be drawn on the evidence that was before her, was that the appellant had, with malice aforethought, caused the death of her husband.

She found her guilty of the offence of murder and convicted her. The appellant was sentenced to death.

Four points of law have been raised in support of the appeal. The first is that the uncorroborated testimony of Edward Chanda should not have been accepted; the second is that the trial judge's finding that the pathologist's report tallied with the testimony of the prosecution witnesses is not supported by the evidence; the third is that the appellant's explanation of what happened that night should have been accepted as it was reasonably possible; and the fourth is that an inference that the appellant was guilty of murdering her husband is not the only one that could have been drawn on the evidence that was before the trial judge.

In support of the argument that the uncorroborated testimony of Edward Chanda should not have been accepted, State Counsel Lungu referred to the case of **The People v Njovu**[1] and submitted that to prove a charge of murder, it must be established that the offender caused death with

malice aforethought. The trial judge relied on the evidence of Edward Chanda, a witness who conceded that he was not present on the fateful day and that he had never confronted the appellant on the allegations her husband allegedly made against her.

State Counsel Lungu then referred to the cases of **R v Baskervill**[2], **Nsofu v The People**[3] and **DPP v Esther**[4] and submitted that since Edward Chanda conceded to not having talked to the appellant about her husband's allegation, his testimony was one sided and required corroboration. Independent evidence should have been led to corroborate the claim that she used to fight her husband in view of the fact that the appellant's daughter, who lived with her parents, made no mention and was not questioned on the violence when she gave evidence.

In response, Mr. Masempela submitted that the trial judge did not only rely on the evidence of Edward Chanda to conclude that the appellant had *malice aforethought*. She also considered the testimony of Voggy Chuuya, who talked about the difference between the appellant and her husband

following the phone call at the lodge. He referred to the case of **George Musupi v The People**[5] and submitted that there was no basis for requiring the testimony of Edward Chanda to be corroborated because there is no evidence suggesting that he is a suspect witness or a witness with a possible interest of his own to serve.

In the case of **David Dimuna v The People**[6] at page 201, Gardner JS, delivering the judgment of the court, noted as follows:

> **"With regard to the question whether or not one police officer who is challenged should be corroborated, we confirm that we have said that it may be desirable in such circumstances, if there are other police officers available, for them to be called to give evidence. But there is no suggestion that there is any rule of law or otherwise for there to be corroboration for a single police witness."**

In my view, the position taken by the Supreme Court as regards the testimony of a single police officer, is applicable to any witness in a criminal case. Unless the

law requires that a fact should be proved by more than one witness or a witness falls in the category of witnesses whose evidence requires corroboration, a fact that is in dispute can be proved by a single witness.

As Mr Masempela correctly submitted, there is nothing that suggests that Edward Chanda fell in the category of witnesses whose evidence requires corroboration. Though it would have been competent for the court to accept this witness' evidence even if it was not corroborated, the trial judge considered it in light of the appellant's daughter's evidence of how the appellant used to relate with her husband and Voggy Chuuya's testimony on her conduct at the lodge.

In the circumstances, I am of the view that on the evidence before her, the trial judge cannot be faulted for accepting Edward Chanda's evidence that the appellant used to fight with her husband.

Coming to the argument that the trial judge's view that the pathologist's finding tallied with the testimony of

the other prosecution witnesses, State Counsel Lungu pointed out that according to the pathologist, the only injury he saw was on the forehead and upper part of the face. He found that Owen Lungu had suffered pericranial haematoma of the frontal bone. However, all the other witnesses only saw the injury that was either on the neck or back of the head. He submitted that this being the case, there was misdirection when the trial judge found that the pathologist's findings tallied with what the witnesses saw because their evidence did not relate to injuries in the same place.

State Counsel Lungu also submitted that the trial judge's finding that the injury was caused by a heavy object was not supported by evidence. He pointed out that according to the pathologist, the cause of death was traumatic head injury as a result of a beating or accident. He referred to the case of **The Attorney General v Achiume**[7] and argued that even if we are an appellate court, we can reverse the conclusion that the pathologist's findings are in line with what the witnesses saw and that the injury Owen Lungu

suffered was caused by a heavy object, because they are not supported by the evidence.

State Counsel Lungu's final submission in support of this point was that there is doubt on whether the body examined by the pathologist was that of Owen Lungu. He pointed out that according to his father, he was buried at Mutumbi Cemetery but the body examined by the pathologist was exhumed from Memorial Park. He referred to the case of **Mwape v The People**[8] and invited us to take judicial notice of the fact that Mutumbi and Memorial Park, are not the same cemetery.

In response, and as regards the submission that the pathologist did not find that a heavy object was used, Mr. Masempela referred to the case of **Mangomed Gasanalieu v The People**[9] and submitted that the trial judge was not bound by the opinion of the pathologist merely because he was an expert. Instead, the trial judge was entitled to come to her own conclusion on the evidence that was before her.

As regards doubts on the identity of the body that was exhumed and examined by the pathologist, Mr. Masempela submitted that the post-mortem report shows that the body was exhumed from the Memorial Park and it was identified as that of Owen Lungu by his father. He argued that in the circumstances, the chances of a wrong body being identified was out of question.

The first issue for consideration is the identity of the body the pathologist examined. According to the arresting officer, he was led to the cemetery by Solomon Gregory Lungu, Owen Lungu's father. He identified the grave and the body when it was exhumed before the post-mortem was carried out. Owen Lungu's father and the arresting officer were never queried on the identity of the body that the pathologist examined. In fact, the identity of the body was never in issue.

On the evidence that was before the trial court, it is apparent that Solomon Gregory Lungu was just mistaken on the name of the cemetery where his son was buried. It is

no wonder that while in court he said that it was Mutumbi, yet he had actually taken the police and the pathologist to the Memorial Park, where he identified his son's grave and body. Since he was present when his son was buried, I am of the view that had the issue been raised before the trial judge, there would have been no basis for her to doubt that the body the pathologist examined was that of Owen Lungu.

Coming to the trial judge's conclusion that the pathologist's findings tallied with what the witnesses saw, I agree with State Counsel Lungu's submission that it was not the case. All the witnesses who talked about seeing the injury on Owen Lungu's body, referred to the injury on the neck or back of the head. The only injury the pathologist referred to was the injury on the forehead.

In fact, the pathologist's testimony is that he did not see the injury on the neck or back of the head when he conducted the post-mortem. Notwithstanding this

misdirection, it is my view that it is of no consequence for reasons that I will give in a moment.

As regards the submission that the trial judge's finding that Owen Lungu was hit with a hard object was not supported by evidence, the starting point is the pathologist's view that pericranial haematoma of the frontal bone can be caused by either a beating or an accident. He then went on to rule out the possibility that the injury suffered in this case could have been as a result of a fall. In the case of **Mangomed Gasanalieu v The People**[8], the Supreme Court, considering the approach to be taken by a trial court when dealing with the evidence of an expert, held that:

> **"When dealing with the evidence of an expert witness, a court should always bear in mind that the opinion of an expert is his own opinion only, and it is the duty of the court to come to its own conclusion based on the findings of the expert."**

In the same case, they also held that:

> **"The opinion of the expert must not be substituted for the judgment of the court. It can only be used as a guide, albeit, a very strong guide, to the court in arriving at its own conclusion on the evidence before it."**

In the earlier case of **Lupupa v The People**[10], the appellant appeared before the Subordinate Court charged with five counts of theft by public servant. Before the commencement of the trial, his counsel applied to the court for an order that he be medically examined to determine, among other things, the state of his mind at the time the offence was committed. Subsequently, a report was submitted to the court by the Medical Superintendent of Chainama Hills Hospital. The psychiatrist's opinion was that he was subjected to extraordinary forces of suggestibility equivalent to hypnotism by another individual and it prevented him from the free exercise of his will. Commenting on the trial magistrate's rejection

of this evidence, Baron, DCJ, at page 54, observed as follows:

> **"Mr. Tampi very properly submits that medical evidence, while weighty, is only one of the factors the court should take into account when deciding whether or not an accused person has acted of his own free will or whether he falls within section 9. He submits that simply because a person is tricked by a confidence trickster that does not entitle him to invoke this section and thereby escape the consequences of his act. We accept this submission, but that is not the position here; the medical evidence before the court goes very much further than the appellant being tricked by a confidence trickster. The evidence here is that he was under an influence amounting to hypnotism and that he was not acting of his own free will. It is of course perfectly valid to challenge such an opinion, and this is precisely why we have made the foregoing comments concerning the undesirability of a report of this kind being placed before the court without the maker of the report giving verbal evidence; it cannot be argued in this court that evidence which has not been challenged in the trial court should not be accepted. There was no evidence whatsoever before the trial court which entitled**

it simply to dismiss the medical evidence out of hand and to make a finding, namely that the appellant knew what he was doing and that he was exercising both reason and will when committing the crime, in the teeth of the opinions expressed by a highly qualified psychiatrist; that finding must be set aside as one which could not reasonably be entertained on the evidence ..... "

It follows, that while a court is not bound by the opinion of an expert, there must be good reasons for a court not accepting the evidence of a medical expert. In this case, the pathologist ruled out the possibility that Owen Lungu could have been injured through a fall on his face. This evidence was not contested and the trial judge was entitled to accept it and conclude that he was beaten.

There being no witness to the assault, it was open to the judge to consider how the injury could have been inflicted. In the case of **Mbinga Nyambe v The People**[11], it was held, *inter alia*, that:

"Where a conclusion is based purely on inference, that inference may, be drawn only if it is the

only reasonable inference on the evidence; an examination of the alternative and a consideration of whether they or any of them may, be said to be reasonably possible cannot be condemned as speculation."

Consequently, the trial judge's consideration of how the injury could have been inflicted cannot be labelled as being speculative and not supported by evidence. It is my view that the trial judge was entitled to conclude that a heavy object was used to inflict the injury given the nature of the injury Owen Lungu suffered.

Moving to the arguments that the appellant's explanation should have been accepted and that an inference of guilt is not the only one that could have been drawn on the evidence that was before the trial judge. Since the arguments in support of the two issues are intertwined, I will be deal with them simultaneously.

State Counsel Lungu pointed out that there was evidence before the trial court that Owen Lungu started drinking

at 16:00 hours and according to his daughter, Nzali Lungu, appeared drunk when he was talking to her in her bedroom. On this evidence, the court was entitled to draw a conclusion that he was drunk.

There was also evidence from Nzali Lungu that when the appellant called her, she found her father sitting in the bathtub. Further, both Christabel Ngoma and her husband, William Ngoma, confirmed finding him in the bathtub with his head between the taps. All that they saw was a cut on the back of the neck and some blood on the neck. In addition, there was evidence from the pathologist that the cause of death was either from a beating or an accident.

State Counsel Lungu submitted that in the face of this evidence, the appellant's explanation that she heard a thud in the bathroom and when she went there, she found that her husband had fallen in the bathtub was reasonable. He referred to the case of **Dorothy Mutale and Another v The People**[12] and submitted that in the face of evidence

pointing at the possibility of him falling or being assaulted, the court should have drawn an inference favourable to the appellant, that he fell.

State Counsel Lungu also pointed out that the learned trial judge ruled out the possibility of an accident because he was not totally drunk and could not have fallen into the bathtub. His intoxication was disregarded as a factor merely because he was not totally drunk. He referred to the cases of **Maseka v The People**[13] and **Saluwema v The People**[14] and submitted that the appellant's explanation that her husband fell into the bathtub should have been accepted because it was probable.

State counsel then referred to the case of **Phiri and Others v The People**[15], in which it was opined that courts must make decisions on the evidence placed before them and where there are gaps, they should not fill in such gaps by making assumptions that are adverse to accused persons. He further submitted that the trial judge erred when she found that the appellant attacked her husband

because there is no evidence to support such a finding. He argued that she relied on the uncorroborated evidence of Edward Chanda of the marriage having a history of violence and yet Voggy Chuuya said after differing over the phone call, the appellant calmed down. There was also evidence from the appellant's daughter, that although her parents used to quarrel, the 18th of October 2015, was just a normal day.

State counsel referred to the cases of **Bwanausi v The People**[16] and **David Zulu v The People**[17] and submitted that the conviction in this case is not competent because an inference of guilt is not the only one that could have been drawn on the evidence that was before the trial court. It is possible that the man could have died from an accidental fall.

In response, Mr. Masempela referred to the cases of **David Zulu v The People**[17] and **Sakala v The People**[18] and submitted that although the evidence against the appellant was circumstantial, the conviction is competent because an inference of guilt is the only one that can be drawn on

it. He pointed out that the last time Owen Lungu was seen alive he was in good health. He went drinking and thereafter had a chat with his daughter. He also argued that this circumstantial evidence was further strengthened by odd coincidences and referred to the case of **Kalaba Ilunga and John Masifu v The People**[19] in support of the proposition.

According to Mr. Masempela, the odd coincidences were that: although the children's bedroom was closer to the bathroom than the appellant's bedroom, they did not hear their father fall; the strange position in which the body was found lying; the head was between the taps and the legs stretched out. He also referred to Edward Chanda's evidence that Owen Lungu used to complain about the violence he suffered at the hands of the appellant. He argued that in the face of all this evidence, it cannot be argued that the appellant's explanation of what transpired was plausible.

Mr. Masempela also submitted that in the face of evidence that the body was found between the taps and that the

cause of death could have been as a result of an assault, the court was entitled to reject the appellant's explanation as not being reasonably true. He also submitted that because of the body's position in the tub, the court correctly rejected the claim that he fell because he was drunk.

In reply to Mr. Masempela's arguments, State Counsel Lungu referred to the cases of **John Mkandawire and Others v The People**[20] and **Kalaba Ilunga and John Masifu v The People**[19] and conceded that odd coincidences can be corroborative evidence. However, he argued that the trial judge's finding that the body was neatly lying in the bathtub is not supported by the testimony of those who saw the body. The evidence does not support the finding that the appellant attacked and led her husband into the bathroom.

It was further submitted that while the trial judge saw the bathtub, she did not see the injuries on the body to conclude that the taps could not have caused them. This being the case, it was his submission that the finding was flawed.

The circumstances leading to Owen Lungu's death, according to the appellant, was that while in bed with him, she heard a thud. He was no longer in bed and when she went to the bathroom, where the sound came from, she found that he had fallen in the bathtub face up. He had also suffered an injury at the back of the head. This explanation suggests that he died after falling in the bathtub.

When assessing whether this explanation can reasonably be true, the starting point is the pathologist's finding that he died from precranial haematoma of the frontal bone. This was an injury to the front of the head, which the pathologist found could not have resulted from a fall. This uncontested evidence was accepted by the trial judge and as was held in the case of **Lupupa v The People**[10], cannot at this point be contested. Since the pathologist ruled out falling, State Counsel Lungu's submission that there were two possible inferences, falling or being beaten, is not tenable.

The evidence accepted by the trial judge only pointed at one hypothesis; Owen Lungu was assaulted. This being the case, the appellants explanation that he fell in the bathtub cannot reasonably be true. The fact that he was drunk, or as State Counsel Lungu put it, totally drunk, does not help the appellant's case in any way as the pathologist's testimony is that the injury could not have resulted from a fall. The trial judge, cannot, in the circumstances, be faulted for not accepting her explanation.

Coming to the inferences that could have been drawn on the evidence, the circumstantial evidence against her was that she had a history of being violent against her husband; she quarrelled with him earlier that evening; the last time Owen Lungu was seen alive was when he retired to bed with his wife apparently unharmed; there was no evidence of any intruder entering the house that night and the appellant is the person who called people to the bathroom where he was found injured and dying or dead from injuries inflicted in an assault.

The trial judge found that the only inference that could be drawn on this evidence was one of guilt. In my view, that finding is supported by the evidence before her. There is no basis for finding that a person other than the appellant inflicted the fatal injuries on Owen Lungu.

Though I accepted the argument that the trial judge's finding that the pathologist's findings were in line with what the prosecution witnesses was not correct, it is my view that the misdirection was of no consequence. Further, having dismissed the three other arguments in support of the appeal, it is my view that the appeal against conviction must fail.

I have looked at the sentence and find that the evidence before the lower court did not disclose anything that would have extenuated the circumstances in which the offence was committed. I would uphold the sentence imposed by the lower court.

Makungu, JA: I have had the advantage of reading the judgment prepared by the Deputy Judge President. For the reasons which he gives, which I entirely accept, I would dismiss this appeal.

Mulongoti, JA: I have had the advantage of reading the judgement of the Deputy Judge President. I agree with his views and I am fortified by the all-embracing principle enunciated in **David Zulu v The People**[17] by the Supreme Court in the classic words of Chomba JS, at page 152, that:

> **"The judge in our view must, in order to feel safe to convict, 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 circumstances of this case are such that they permit only an inference of guilt. I would therefore dismiss this appeal.

Lengalenga, JA: I have had the advantage of reading the judgment prepared by the Deputy Judge President. For the reasons which he gives, which I entirely accept, I would dismiss this appeal.

Majula, JA: I have had the advantage of reading the judgment prepared by the Deputy Judge President. For the reasons which he gives, which I entirely accept, I would dismiss this appeal.

Sichinga, JA: It is of course not unusual in our jurisdiction for a court to convict solely on circumstantial evidence. However, for such a conviction to be safe and sound at law, certain requirements must be satisfied, as set out in the authorities to which I shall make reference. The law relating to how the courts are to treat circumstantial evidence has long since been established in our jurisdiction, most of which is by case authority or judicial precedence. Prominent among various cases on this subject is **David Zulu v. The People**[17], which has been cited and applied in a plethora of cases to

justify or disqualify reliance on circumstantial evidence, as the case may be.

The Supreme Court in the said case of **David Zulu v. The People**[17] gave sound guidance as to what circumstances would warrant a conviction on the basis of circumstantial evidence. The Court pronounced itself in this regard as follows;

> **"The Judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjuncture so that it attains such a degree of cogency which can permit only an inference of guilty."**

The Supreme Court restated this position in the case of **Mbinga Nyambe v. The People**[11] wherein it stated that the Court may properly convict on circumstantial evidence provided the only reasonable inference is the guilt of the accused. Equally, the Supreme Court in **Saidi Banda v. The People**[23] was of the view that circumstantial evidence may be as good as direct evidence, and went on to state as follows;

> **"Circumstantial evidence ... notwithstanding its weakness as we alluded to in the David Zulu case, is in many instances probably as good, if not even better than direct evidence."**

More recently, this court in **Ezious Munkombwe and Others v. The People**[24] stated that;

> **"...when considering a case anchored on circumstantial evidence, the strands of evidence making up the case against the appellants must be looked at in their totality and not individually."**

Having set out some of the facts upon which the learned trial judge relied when she made an inference of guilt, I will now address my mind to the ultimate question of whether in the circumstances of this case, and in view of the legal basis upon which a court can properly convict on the basis of circumstantial evidence, the circumstantial evidence was so cogent as to eliminate all other inferences other than that of the appellant's guilt. In so doing, I will have due regard to the notion that

circumstantial evidence by its nature is indirect evidence, but it should not be seen to be an opportunity for a trial court to fill in the gaps of the prosecution's case and suggest what could have happened in the absence of evidence to that effect, circumstantial or otherwise. I am equally mindful that, as was stated recently in the case of **Ezious Munkombwe and Others v. The People**[24] the strands of circumstantial evidence making up the case against the appellant must be considered in their totality, and not individually.

I will start by considering how the court treated the evidence of PW1, Voggy Chuuya when establishing motive. A reading of the lower court's judgment reveals that the court found that the appellant was so angry with the deceased when he refused to hand over his phone to her after she confronted him on suspicion that he had been talking to a prostitute. There is also evidence from the same witness to the effect that the appellant was in a stable condition when she returned from her attempt to get the phone from the deceased, and that she did not seem

annoyed, as she went back to sit and continued drinking and left shortly thereafter. From this evidence, the trial court found that she was angry and therefore had the motive and intention, if not to kill, then to cause grievous harm.

Still on the evidence of Voggy Chuuya, it is on record that the appellant called PW1 about 20-30 minutes after she had left, to inquire whether they were still at the lodge. When Voggy Chuuya responded in the affirmative, she told him she would bring her sister's clothes, which she did and still left the deceased and others at the lodge, who left a few minutes after the appellant had gone home. From this evidence, the court found that there is no evidence that the appellant's sister asked her to bring her clothes and went ahead to infer that the appellant was very upset with the deceased, such that she went home to prepare the ground for a fight later, hoping that he would follow, and when he did not, she returned under the guise of taking clothes to her sister.

As regards the evidence of PW4, Edward Chanda to the effect that the appellant had the tendency of being violent towards the deceased when they quarrelled, this evidence has to be considered in relation to the interaction of the deceased and the appellant on the material day, that is, whether the evidence on record permits an inference that the appellant was possibly violent towards the deceased on the material day. According to the evidence of the appellant's daughter-PW5, Nzali Lungu with regards to the relationship of her parents, she told the court that sometimes they would quarrel and other times they would be happy. With particular reference to their temperament on the material day, PW5 stated that they were just normal, nothing different.

The other evidence on record is that the appellant entered the house after the deceased and found him in their children's bedroom chatting with the children. Meanwhile, the appellant began to iron clothes in preparation for church the following day, and the deceased also asked her

to iron his clothes, which she did. When the appellant finished ironing, she went to bed and found that the deceased was already asleep. According to the appellant's testimony, she slept and was only awoken by the sound of something falling in the bathtub and when she went to check, she found the deceased lying in the bathtub and tried to wake him up. Other witnesses equally testified that indeed, the deceased was in the bathtub.

On the basis of this evidence, the trial court's inference was that it is possible that the appellant attacked the deceased in the bedroom and when she noticed he was badly hurt or was on the verge of collapse, she led him to the bathroom, where he then collapsed. She went on to state further that it was possible that after she hit him, he bled on her white pair of trousers, that is why she mentioned that before going to bed she soaked her white trousers, though she did not say when and how they got dirty. In addition, the trial judge stated that the lack of evidence regarding blood in the bedroom does not mean he did not bleed, as it is possible, according to the

evidence of PW11, Tadjmneat Musakhanov that the bleeding was internal and not outside, hence the lack of blood on the scene.

It appears that the learned trial judge omitted to consider, or totally ignored Voggy Chuuya's evidence that the appellant did not seem upset or annoyed when leaving, such that she even returned to her seat after having followed the deceased and continued drinking for a while before she left. The trial court's inference that the appellant went home to prepare the ground for a fight is very critical to the establishment of the appellant's motive, and for this inference to be proper, it ought to have been made on the basis of evidence on record, from which such an inference may be properly drawn.

I do not see any direct or circumstantial evidence to suggest that the appellant, after leaving the lodge, and from when the deceased received a phone call at the lodge until when she went to bed, was so outraged that she went home to prepare the ground for a fight, or that she was still angry with the deceased when they got home, thereby

forming an intention to either cause grievous harm or indeed to murder the deceased. Further, although there is no evidence that the appellant's sister asked her to bring clothes, it is on record that the appellant called her brother-in-law, Voggy Chuuya, to inform him that she would be taking his wife's clothes. I do not see how it is material that the appellant's sister did not ask her to bring the clothes. Moreover, the findings of the learned trial judge regarding the lack of evidence of blood in the bedroom or anywhere else in the house are both contradictory and speculative. She first stated that the appellant possibly hit the deceased and he bled on her white trousers, hence her statement that she soaked her white trousers before going to bed. On the other hand, the learned trial judge stated that the deceased could have bled internally, hence the absence of blood on the purported crime scene.

I am of the view that the inference made by the trial court that the appellant went to prepare the ground for a fight when she left the lodge on the material day is

merely speculation as it is not supported by any evidence on record, circumstantial or otherwise. In as much as I am in agreement with the trial court that the appellant's brother-in-law Voggy Chuuya (PW1) had no motive to falsely implicate the appellant, I fail to appreciate the factual basis upon which the trial court made this inference.

Furthermore, in the absence of any circumstantial or direct evidence suggesting that the appellant on the material day had the propensity to be violent towards the deceased, I am not inclined to attach much weight to the evidence of Edward Chanda PW4 *vis* the appellant's alleged violent tendencies. I am therefore of the view that the circumstantial evidence that the learned trial court purportedly relied on when it convicted the appellant did not satisfy the requisite threshold of cogency. It cannot therefore be said that the circumstantial evidence on record effectively eliminates all inferences other than that of the appellant's guilt. Consequently, I hold the view that the first ground of appeal should have succeeded.

In considering the second ground of appeal, I am guided by the case of **Saluwema v. The People**[14] in which it was held that:

> **"If the accused's case is reasonably possible even though not probable, then reasonable doubt exists in the prosecution's case."**

As such, the question to be determined is whether the appellant's explanation of the events that transpired on the material day is so reasonably possible as to cast doubt in the prosecution's case. I am of course mindful that in an attempt to exonerate herself, it is not for the appellant to prove how the deceased may have met his death. Hers is merely to give an explanation reasonable enough to cast doubt in the prosecution's case, such that if she succeeds, the prosecution cannot be said to have discharged its burden of proof.

I will now proceed to analyse the appellant's explanation. The appellant testified that the reason why she followed the deceased after he received a second phone call was because he had taken long. She denied having quarrelled with the deceased. That when she went to bed on the

material day, after having ironed clothes for herself and the deceased in readiness for church the following day, she found the deceased already asleep. The next time she saw him was when she went to the bathroom to check what had happened after having heard the sound of something falling in the bathtub. According to the appellant, she found the deceased lying in the bathtub face up, with his head between the taps, and she tried to wake him up, but to no avail. In the process, she began to scream the deceased's name and that is when their daughter, Nzali Lungu PW5 woke up and according to her testimony, she found the appellant shaking the deceased and calling his name.

The appellant's evidence regarding the position in which the deceased was found was indeed confirmed by other witnesses who soon joined the appellant in the bathroom. As regards the injuries at the back of the deceased's head, William Ngoma, DW2 stated that when he lifted the deceased's head, he saw a small dent and a small cut at the back of the head. Christabel Ngoma, PW6 testified to

having seen blood on the colar of the deceased's shirt. Felix Banda, PW3 stated that when he inspected the deceased's body at the funeral home, he noticed an injury at the back of the head, which looked like something had been inserted in the head and made a cut. PW2 also confirmed having seen a cut at the back of the deceased's head, although he did not describe it. Aaron Banda, PW8 also testified to having seen blood at the back of the deceased's head. According to Samson Mbewe, PW9, who washed the deceased's body in preparation for burial, he noticed a cut at the back of the deceased's head and blocked the wound to stop the bleeding. The only witnesses who actually gave evidence relating to the descriptive nature of the injuries were Felix Banda, PW3 and William Ngoma,DW2, while the other witnesses merely testified to having seen a cut at the back of the head, and blood on the collar of the t-shirt. According to the pathologist's (PW11) evidence, the cause of death was traumatic head injury which could have been as a result of a beating or accident.

In support of this ground, the appellant contends that the trial court totally discarded the evidence that suggests that the deceased could have been intoxicated and may have fallen in the tab. There is indeed evidence on record, from the testimony of Voggy Chuuya, that the deceased had been consuming alcohol for more than six hours before he went home on the material day. Nzali Lungu, PW5, also testified the deceased was behaving the way he did when he was drunk, and on this basis, the appellant submits that from this factual evidence, the court should have drawn a conclusion that the deceased was possibly drunk and could have fallen in the tub, instead of purportedly ruling out the possibility of an accident because in the mind of the learned trial judge, the deceased was not totally drunk and could therefore not have fallen in the tub.

To support the plausibility of the deceased having fallen in the bathtub, the appellant relies on the evidence relating to the position of the deceased's body in the bathtub, that is; head facing upwards under the taps, the

injury at the back of the deceased's head, the testimony of the pathologist to the effect that the traumatic head injury could have possibly been as a result of an accident or a beating, as well as the evidence of the deceased's drunken state on the material day.

The respondent is opposing this ground on the basis that the appellant was the last to be seen with the deceased before his demise, and the first to be found with his body after his death. The respondent is also in support of the court's reliance on its ocular observation of the bathtubs and taps when it rejected the appellant's observation as being unreasonably true. The said observation of the trial court was that the taps between which the deceased head was positioned are not the kind that would inflict the type of injuries observed by the other witnesses.

As regards the court's ocular observations, which it was indeed entitled to make, the appellant is not satisfied that the trial judge made proper use of its ocular observations, and in this vein submits that the court did not have an opportunity to see any pictures of the

injuries at the back of the deceased's head as described by some witnesses, and that there was no reference to the said injuries in the post mortem report submitted into evidence by the prosecution.

I am of course mindful of the trite law that an appellate court should not interfere with or reverse findings of fact made by a trial court unless under certain circumstances. In this matter, there is one finding of fact which requires some introspection, and that is the finding that the taps are not the kind that would inflict the type of injury that the witnesses described, which the trial court made upon inspection of the bathtub in which the deceased was found. This finding was very crucial in the determination of the appellant's guilt, as it influenced the trial judge's decision to reject the appellant's explanation.

Since the prosecution's evidence in this matter is almost entirely circumstantial, I hold the view that the finding made by the trial court ought to have been made on the totality of all the evidence relating to the injuries at

the back of the deceased's head and how the same may have resulted in his death. William Ngoma, DW2 saw a small dent and a small cut, while Felix Banda PW3, saw a cut looking like something had been inserted in the head. Gregory Lungu, PW2 and Samson Mbewe, PW9 also saw a cut at the back of the deceased's head but they did not describe it. Other witnesses saw blood oozing out of the back of the deceased's head, thereby staining his t-shirt. The post mortem report made no mention of any injury at the back of the deceased's head. The learned trial judge, when she stated that the taps she observed are not the type that could have inflicted the kind of injuries described by the witnesses, ought to have based her reasoning on the evidence of Felix Banda and William Ngoma as these are the only witnesses who actually described the injuries at the back of the deceased's head. The evidence of these two witnesses in this regard is in fact inconsistent to the effect that the type of injuries described by the two witnesses is not the same, that is; a small dent, a small cut and a cut that looked like something had been inserted in the head. DW2 saw two injuries while PW3 only saw one.

PW3 and PW9, although not describing the injury, only saw one cut. The trial court was not presented with any photographic evidence of the said injury or injuries in order to see what type of injury the deceased had at the back of his head. As such, coupled with the inconsistency of the descriptive evidence of DW2 and PW3 *vis* the nature of the injuries, I firmly agree with the appellant that the trial judge did not make proper use of its ocular observation of the bathtub in which the deceased was found, for the reasons stated earlier.

Consequently, I deem this a proper case befitting of the exercise of this court's discretion to set aside a finding of fact made by a trial court on the basis that it was a finding which, on a proper view of the evidence, no trial court acting correctly, could reasonably have made. In this particular case, my opinion is that the trial court made a flawed finding of fact that the taps she observed were not the type that would inflict the kind of injuries described by the witnesses, when such descriptions by the two witnesses were in fact inconsistent.

As regards Pathologist's evidence that the traumatic head injury that caused the deceased's death could have been as a result of the beating or an accident, my view is that there is a window of possibility that the appellant's explanation that she heard the sound of something falling in the bathtub is reasonable. In any event, as guided by the case of **Maseka v. The People**[13], the question is whether there was a reasonable explanation offered by the appellant, not whether such explanation was true or not. In my view, on the totality of the evidence relating to the injuries sustained by the deceased and the possible cause of death being an accident, the appellant's explanation is reasonable. I am alive to the legal principle that the accused is exonerated not necessarily by the strength of his defence, but by the weakness of the prosecution's case. Suffice to say, I am satisfied that the explanation of the appellant is so reasonable as to have the effect of casting doubt on the prosecution's case, and in the circumstances *in casu*, the prosecution cannot be said to have discharged its burden of proof.

Also, still on the evidence that the deceased's injuries could have been caused by an accident or a beating, it cannot properly be said that the only inference that can be drawn in the circumstances is that of the appellant's guilt. The evidence in fact creates the likelihood of two possible inferences that could be drawn, that is; that the deceased was either beaten or he accidentally fell in the bathtub. A proper analysis of William Ngoma's description of the injuries, that is; a small dent and a small cut, actually suggest the likelihood of the deceased hitting his head on the taps and falling. The trial court disregarded the possibility of the deceased having fallen in the bathtub, as she attached little relevance, if any, to the evidence indicating that the deceased was possibly intoxicated. Needless to say, where more than one inference is possible, such inference is to be construed in favour of the accused. As such, my opinion is that the trial court erred when it totally disregarded the appellant's explanation, which was reasonably possible in the circumstances.

Furthermore, the respondent is challenging the evidence of the appellant that she was awaken by the sound of something falling in the bathtub on the basis that her children did not hear anything, notwithstanding that the children's bedroom is closer to the bathroom than that of the appellant. Indeed, Nzali Lungu, who was awoken by her mother's screaming in the bathroom, did not give any testimony with regards to the noise of something falling in the bathtub. In my view, this evidence of the appellant cannot totally be disregarded by reason only that none of her children heard what she heard. In any event, PW5 neither confirmed nor denied having heard the sound in the bathroom. For the reasons set out above, this ground of appeal accordingly ought to have succeeded.

As regards the third ground of appeal, the gist of the appellant's argument is that instead of treating the uncorroborated evidence of Edward Chanda as gospel truth, the trial court should have warned itself of the danger of relying on Edward Chanda's evidence as far as motive was concerned, seeing as his story was based on what he

had been told by the deceased, and that it is therefore doubtful that the appellant had motive to cause the death of the deceased.

The question I find myself having to answer under this ground is whether Edward Chanda PW4 is a witness with a motive to give false evidence and falsely implicate, so as to necessitate corroboration of his testimony. I make reference to a portion of the trial court's judgment where the trial judge stated at page J41 to J42 that:

> **"I had opportunity to observe the demeanour of PW4-Eddie Chanda during trial and he struck me as a credible witness. His evidence that the deceased told him that the accused would fight him for going home late and throw any objects at him was not rebutted.....**
>
> **...I have no reason not to believe the evidence of PW4, who was candid enough to say he had never been to her house or spoken to the accused. He had no motive to falsely implicate her. As regards the evidence of PW1 regarding the events of that night at the lodge, I have no difficulty in believing his**

testimony that the deceased and the accused differed over his receipt of a second phone call."

The Supreme Court in the case of **George Musupi v. The People**[5] supra gave guidance on how to treat the evidence of a witness with a likelihood of giving false evidence when it stated as follows:

"Once in the circumstances of the case it is reasonably possible that the witness has motive to give false evidence, the danger of false implication is present and must be excluded before a conviction can be held to be safe."

A reading of the excerpt quoted above reveals that the trial court indeed did endeavour to disqualify the evidence of Edward Chanda from that which falls in the category of suspect witnesses with an interest serve, and I agree with the learned trial Judge's position to this extent. In order to successfully discard the evidence of PW4, the appellant needed to show that the witness, because of the circumstances of the case, may have had a motive to falsely implicate the accused. From the evidence on record, I see no such possible motive on the part of PW4 and I am satisfied that the trial court excluded the

danger of false implication. As such, there was no need to corroborate the evidence of PW4.

However, the evidence regarding the appellant's alleged violent tendencies towards the deceased ought to be considered in the context of the events that transpired on the material day, and it must be sufficiently established that the appellant was potentially violent towards the deceased on that day. As I stated earlier on, the circumstantial evidence on record is not sufficient to exclusively establish that the appellant beat the deceased, thereby causing his death. I am of the view that this ground of appeal should fail, but only to the extent that the testimony of Edward Chanda did not require to be corroborated. However, for the reasons I have alluded to, the trial court should not have attached much weight to the evidence of Edward Chanda, as in the circumstances of this case, it does not properly add up with any other evidence so as to allow an inference that the appellant beat the accused.

I now move on to the fourth and final ground of appeal. The thrust of counsel's submission under this ground is that there was no nexus between the evidence of the pathologist and that of the other witnesses with respect to the injury sustained by the accused, as while the said witnesses all saw an injury to the back of the deceased's head, the pathologist only remarked to a forehead injury and that the learned trial judge should have therefore disregarded the evidence of the pathologist.

Contrary to the appellant's submission that the trial judge found that there was a correlation between the evidence of the pathologist and that of the witnesses who testified having seen an injury at the back of the deceased's head, a perusal of the judgment shows that the trial court did actually acknowledge that there was a variance between the evidence of the pathologist and that of the other witnesses regarding the location of the deceased's injury, as the post mortem report only makes reference to a frontal injury on the deceased's head.

However, the trial judge then contradicted herself when she stated at page J54 as follows;

> **"It is on record that deceased had an injury at the back of the head and this tie in with the doctor's diagnosis that the injury was caused by a heavy object."**

The trial court's analysis of the evidence of the pathologist was to the effect that it is expert evidence which can only be judged in the light of the other evidence, and that his evidence should not cast doubt on the evidence of all the other witnesses who testified that they saw the injuries at the back of the head. In this regard, I refer to the holding in the case of **Mangomed Gasanalieu v. The People**[9], cited by the learned state advocate to the effect that the evidence of an expert witness is merely a guide and the court is entitled to make its own judgment based on the totality of the evidence presented before it. From what I decipher from this analysis, the trial judge did not attach much weight, if any, to the evidence of the pathologist *vis* the location of the injury on the deceased's head. Moreover,

the evidence of the location of the deceased's injury is not the only one referred to in the post mortem report. There is therefore no basis upon which the whole of PW11's evidence should be entirely disregarded.

There is an argument relating to whether the post mortem examination was indeed carried out on the deceased's body. I note that the basis of this argument is the testimony of the deceased's father, Gregory Lungu (PW2) to the effect that the deceased was buried at Mutumbi Cemetery, contrary to the post mortem examination report on record, which indicates that the post mortem examination was carried out at Leopard's Hill Memorial Park.

I note from the documentary evidence on record that other than the post mortem examination report, there are other documents such as the burial permit and the order of exhumation which indicate Memorial Park as the place where the deceased was buried. There is also undisputed evidence of the arresting officer Lewis Mwila,(PW12) to the effect that he went to Memorial Park in the company of the deceased's father, who identified the burial site. In my

view, the allegation that the post mortem examination could have been carried out on the wrong body, that is, a body other than that of the deceased, cannot be sustained. This assertion is one that needed something more than the possible error of Gregory Lungu, PW2 in his testimony as to where the deceased was buried, and there was no need for the prosecution to lead video or photographic evidence to ascertain at which cemetery the exhumation and post mortem examination were carried out. The fourth ground of appeal should effectively succeed but only to the extent that the trial judge contradicted herself when she stated that the evidence of the witnesses regarding the injuries at the back of the deceased's head ties up with the doctor's diagnosis that the injury was caused by a heavy object, when in fact the post mortem report only made reference to an injury on the deceased's forehead. On the other hand, this contradiction is not fatal or prejudicial to the appellant, as the trial judge did not actually attach much weight to the evidence of PW11, Musakhanov as she categorically stated that it ought to be considered in light of all the other evidence on

record and cannot override the evidence of other witnesses who testified having seen an injury at the back of the deceased's head.

In conclusion, and for the avoidance of doubt, my opinion is that grounds one and two should have succeeded in their entirety. Ground three should succeed to the extent stated therein, and ground four should succeed, equally to the stated extent. Since the first two grounds are the ones dealing directly with the implication of the accused, and seeing as I am of the view that these should have succeeded, the net effect of my opinion is that the conviction and sentence should have been set aside and the appellant set at liberty.

Chashi, JA: I have had the advantage of reading the judgement of my learned brother Sichinga JA, with which I agree. For the reasons he has set out, I would allow this appeal.

Chishimba, JA: I have had the privilege and advantage of reading in draft the dissenting minority judgment by my learned brother Sichinga JA and I entirely agree/concur with his reasoning and conclusions. The circumstantial evidence in this case had not taken the case out of the realm of conjecture to such a degree of cogency permitting only an inference of quit. I am of the view that the explanation advanced by the Appellant that upon hearing a thud, she found the deceased in a bath tub facing up, with his head in between the water taps, coupled with the evidence by PW2, and DW2 who confirmed that the deceased was found in the above position, with the observed injury at the back of the head, does not rule out the possibility that the deceased fell and hit his head resulting in the death. The medical expert evidence was that the peri cranial haematoma of the frontal bone can be caused by either a beating or an accident. Though he ruled out the fall as a cause of injury, taking into account all the evidence on record, I' am of the view that a reasonable acceptable inference in favour of the Appellant can safely be drawn to the effect that the deceased died as a result

of a fall that caused injury to his head. For these reasons I would uphold the appeal.

Kondolo, JA: I have had the advantage of reading the judgement of my learned brother Sichinga JA, with which I agree. For the reasons he has set out, I would allow this appeal.

Siavwapa, JA: I have read the Judgment of my learned brother Mr. Justice Sichinga with which I agree. I have also read the Judgment of the learned Deputy Judge President and I would like to make particular reference to the portion where he states that "the trial Judge cannot be faulted for accepting Edward Chanda's evidence that the Appellant used to fight with her husband." The only issue I have with that statement is whether or not that fact is also evidence that the Appellant killed the deceased and I think not.

Notwithstanding that the testimony of the taxi driver as to the alleged fights between the Appellant and the

deceased did not require corroboration, his testimony is based on what he was told by the deceased, which is hearsay as he had never witnessed a fight between the two. Further with his own admission that on the material day, he did not witness the two fight, the Court below erred by using that testimony as evidence that Appellant attacked the deceased on that fateful night.

Further Voggy's testimony of the Appellant's conduct at the lodge over the alleged phone calls received by the deceased could only have been useful if there was evidence that as a result the Appellant had attacked the deceased but there was none. A trial Judge is not at liberty to speculate that because an altercation had occurred earlier, the same was renewed later.

I have also read that part of the Judgment that relies on the Supreme Court Judgment in **Lupupa v The People**[10]. In that Judgement Baron DCJ makes the point that evidence which has not been challenged in the trial Court should be accepted. He however goes on to state;

> **"There is no evidence whatsoever before the trial Court which entitled it simply to dismiss the medical evidence out of hand and to make a finding, namely that the Appellant knew what he was doing and that he was exercising both reason and will when committing the crime, in the teeth of the opinions expressed by a highly qualified psychiatrist: ....."**

Of course, that finding which was a direct contradiction of the medical expert's opinion was set aside for not being founded on any evidence before the trial Court.

Having read the said case and the relevant extracts of the medical psychiatrist's report, it is apparent to me that the said report was thorough. The Doctor did not only state that the accused had no control of the events of the alleged offence but he explained how that occurred as a result of a gradual subjection by another to **"extraordinary forces of suggestibility equivalent to hypnotism..."** Further that as a result of the above the accused developed a **"neurotic state which made the events**

of the alleged offence occur independently of his own free will."

So, in the face of such clearly expressed medical opinion, the trial Judge was not at liberty to discard it and substitute it with his own opinion that the accused was merely tricked and acted of his free will without any evidence supporting that position.

In the appeal before us, I note that the report rendered by the Pathologist, as well as his testimony before the trial Court was inconclusive as to the cause of the blow that caused the pericardial haematoma of the frontal bone.

He provides two possibilities; namely; an accident or a beating. What he then does is to exclude a fall without stating why in his expert opinion, a fall that brings the forehead into violent contact with a hard object cannot cause the kind of injury that caused the deceased's death.

The principle in criminal law is clear, if that piece of evidence is the one that will secure a conviction, it must take the whole case out of the realm of mere conjecture as in **David Zulu v the People**[17].

In my view, the pathologist's opinion on the cause of the injury is uncertain and the reason for excluding a fall, after stating an accident as a possible cause without explaining why should have placed the trial Court on alert as to the reliability of the opinion.

This places this medical evidence at variance with that in the Lupupa case.

It is therefore, my humble view that even though the trial Court was entitled to accept the medical evidence, it fell short of satisfying the requirements for placing reliance on it and she ought to have rejected that part which excludes a fall because a fall can be an accident and in the absence of anything in evidence to exclude the possibility of a fall, the trial Court should have

accepted it as reasonably possible as enunciated in the case of **Dorothy Mutale and Richard Phiri v The People**[12].

The trial Court should have found that an accident, howsoever, even if not necessarily a fall was a real possibility as no weapon of any kind capable of inflicting such an injury was recovered from the house to exclude a fall.

In her quest to found a conviction, the learned trial Judge went to great lengths in projecting her imagination of how the Appellant killed the Deceased such as the Appellant attacking the Deceased in the bedroom before leading him into the bathroom, attacking him while he was in the bathroom and placing him between the taps after noticing the bleeding. She however, concluded that the attack was in the bedroom after which she led him into the bathroom, arranged the body in the bathroom after which she washed her trousers because there was blood on it. This part of the learned trial Judge's finding of fact is not only perverse but one that is purely imagined

as none of the scenarios she describes as though she was an eye witness is supported by evidence.

This is a clear illustration of how a trial Court can draw wrong inferences from circumstantial evidence, a danger to be seriously guarded against.

As the principle goes, proof in criminal cases must always be beyond reasonable doubt even where only circumstantial evidences is being relied upon.

The accused person needs only raise a reasonable doubt even an improbable one as the case of **Saluwema v the People**[14] holds.

I am therefore, of the view that the prosecution did not discharge its burden to the requisite standard and the Appellant ought to have been acquitted.

I would accordingly allow the appeal and set aside the conviction.

Chisanga, JP: By a majority of six to five, this appeal fails. The appellant's conviction for the offence of murder and the sentence imposed on her by the High Court, are upheld.

F. M. Chisanga
JUDGE PRESIDENT

C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

C. K. Makungu
COURT OF APPEAL JUDGE

J. Chashi
COURT OF APPEAL JUDGE

F.M. Chishimba
COURT OF APPEAL JUDGE

J. Z. Mulongoti
COURT OF APPEAL JUDGE

D. L. Y. Sichinga
COURT OF APPEAL JUDGE

M. M. Kondolo, SC
COURT OF APPEAL JUDGE

F.M. Lengalenga
COURT OF APPEAL JUDGE

M. J. Siavwapa
COURT OF APPEAL JUDGE

B.M. Majula
COURT OF APPEAL JUDGE