IN THE COURT OF APPEAL OF ZAMBIA **APPEALS 25/2021**
HOLDEN AT NDOLA AND LUSAKA
(Criminal Jurisdiction)

BETWEEN:

ALEX CHILUFYA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Ngulube, Majula, JJA

On: 21st August 2018 and 26th August 2021

For the appellant: H.M. Mweemba, Principal Legal Aid Counsel, Legal Aid Board

For the respondent: C.M. Hambayi, Deputy Chief State Advocate, National Prosecution Authority

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J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. Major Isaac Musonga v The People [2009] Z.R. 242
2. David Zulu v The People [1977] Z.R. 151.
3. Imusho v The People [1972] Z.R. 77
4. Director of Public Prosecutions v Risbey [1977] Z.R.

1. INTRODUCTION

1.1. The delay in the delivering this judgment is deeply regretted.

1.2. The appellant, appeared before the High Court (Zulu, J.) sitting at Kabwe, jointly charged with another person, on an information containing one count of the offence of murder, contrary to **section 200 of the Penal Code.**

1.3. The allegation was that on 20th May 2017, in Serenje, they murdered Ellena Ndashe Chiti. They denied the charge and the matter proceeded to trial.

1.4. At the end of the trial, the appellant was convicted and condemned to suffer capital punishment. His co-accused was acquitted.

1.5. The appellant has appealed against the conviction.

2. CASE BEFORE TRIAL COURT

2.1. The evidence before the trial judge was that on 20th May 2017, in the morning, David Mofya, of Kalila in Serenje, left his house for church in

the company of his wife. At the house, they left behind his mother, Ellena Ndashi Chiti and their daughter, Mirriam Kaliwa.

2.2. When they returned from church, around 14:00 hours, they did not find Ellena Ndashi Chiti at home. After looking around the homestead and not seeing her, they decided to go to the field to collect some maize.

2.3. On their way to the field, they found the lifeless body of Ellena Ndashi Chiti in the footpath. They observed a deep cut at the back of the head.

2.4. With the help of members of the public, the body of Ellena Ndashi Chiti was conveyed to the village.

2.5. On the same day, Mirriam Kaliwa told her father that earlier that day, around 11:00 hours, she heard chickens chuckling at the coop behind the house. When she got there, she found the appellant. He started pushing away a bicycle and when she greeted him, he did not respond.

2.6. As he walked away, the appellant told Mirriam Kaliwa not to tell anyone that he had been to their

house. He also told her to erase the tire marks made by his bicycle.

2.7. On the receipt of this information, David Mofya, approached Mwanje Chisenga and David Kunda, members of the community crime prevention unit. He demanded that they apprehend the appellant. They went to his house but did not find him. His wife told them where he was and they apprehended him.

2.8. The appellant confessed to Mwanje Chisenga and David Kunda that while in the company of others, he inflicted the injuries that caused Ellena Ndashi Chiti's death. He said they killed her because she was a witch.

2.9. In the days that followed, a postmortem examination confirmed that the wound Ellena Ndashi Chiti suffered on the back of the head, caused her death. The pathologist found that she suffered a fractured skull and severe brain damage.

2.10. In court, the appellant said he admitted causing Ellena Ndashi Chiti's death after being beaten. He denied killing her or visiting David Mofya's house

on 20th May 2017. He said on that day, he travelled out of the village to Mukushi at 07:00 hrs and only returned after 19:00hrs.

3. ARGUMENTS IN SUPPORT OF THE APPEAL

3.1. Mr. Mweemba has submitted that even if Mwanje Chisenga and David Kunda, where not police officers, the trial judge should have exercised his discretion and not accepted their evidence of the appellant's confession because it was unfairly obtained.

3.2. He referred to the case **Major Isaac Musonga v The People**[1] and submitted that even though community crime prevention unit members were not persons in authority, where they obtain evidence using unfair means, the court has the discretion to exclude such evidence.

3.3. Mr. Mweemba argued that even though Mwanje Chisenga and David Kunda denied beating the appellant, the trial judge should still have found that it was the case. This is because the duo were unlikely to accept that they had assaulted him.

3.4. He then pointed out that without the confession statement, the only evidence against the appellant was the evidence Mirriam Kaliwa that he went to their house. He referred to the case of **David Zulu v The People**[2] and submitted that an inference that the appellant committed the offence cannot be arrived at on that evidence only.

4. ARGUMENTS AGAINST THE APPEAL

4.1. In response, Mrs. Hambayi argued that the appellant's confession to Mwanje Chisenga and David Kunda, was properly admitted into evidence as there was no basis on which it should have been excluded.

4.2. She went on to point out that the evidence of Mirriam Kaliwa, which placed him at the house, supported the appellant's confession.

5. CONSIDERATION OF APPEAL BY THE COURT

5.1. In this appeal, Mr. Mweemba is urging us to find that the trial judge should have exercised his discretion and not accepted Mwanje Chisenga and David Kunda's testimony on the appellant's

confession. Our understanding of his argument, is that even if the duo denied beating the appellant into confessing, the trial judge should still have found that they beat him and thus that the confession statement was unfairly obtained.

5.2. In this case, it is clear that there were two conflicting versions of the circumstances in which the appellant confessed. The appellant's position was that he only confessed to the killing after being beaten, while the prosecutions version was that no beating took place before the confession and that it was voluntary.

5.3. The trial judge decided to accept the version given by the prosecution witnesses. The extent to which an appellate court can interfere with a trial court's finding of fact, which is anchored on credibility, was considered in the case of the **Director of Public Prosecutions v Risbey**[3].

5.4. In that case the Supreme Court held that:

> '..... **where the issue is one of credibility and inevitably reduces itself to a decision as to which of two conflicting stories the trial court**

accepts, an appellate court cannot substitute its own findings in this regard for those of the trial court.'

5.5. Further, in the case of **Imusho v The People**[4], the Court of Appeal, the forerunner to the Supreme Court, held that:

'An appellate court will not interfere with a finding of fact if there was reasonable ground for it, but such finding will be set aside if it was made on a view of the facts which could not reasonably be entertained.'

5.6. In this case, the trial judge, faced with two conflicting accounts of what happened, decided to believe the prosecution story. Mr. Mweemba has not set out any legal basis on which the trial judge's acceptance of the prosecution witness's version of events should be faulted.

5.7. Rather, he argues that since the prosecution witnesses were unlikely to accept that they beat the appellant, we must find that it was the case. We find this argument to be strange, as taking such an approach offends settled principles of

the law on the circumstances in which an appellate court can set aside a finding of fact.

5.8. Findings of fact must be supported by evidence. In the same breath, they can only be assailed if they are not supported by the evidence or are founded on a wrong assessment of the evidence.

5.9. In this case, as guided by the cases **Director of Public Prosecutions v Risbey**[3] and **Imusho v The People**[4], we can only set aside the trial judge's finding that the appellant's confession was voluntary on the ground that it was not supported by the evidence or that it was not reasonable, considering the evidence that was before him.

5.10. We do not find that there is any basis for coming to that conclusion. That being the case, it is our view that the trial judge was entitled to believe the prosecution evidence in preference to the appellant's version of what happened.

5.11. We are satisfied that the trial judge, who had the opportunity to hear the witnesses and observe their demeanour, was entitled to reject the

appellant's claim that he confessed because he was beaten.

5.12. In the face of evidence from Mirriam Kaliwa that the appellant went to their house and told her not to tell anyone that he had been there and evidence that he confessed to the killing, it is our view that the trial judge was correct when he found that the case against the appellant, was proved beyond all reasonable doubt.

6. VERDICT

6.1. We find no merit in the appeal and we dismiss it. We also uphold the sentence imposed on the appellant as the evidence that was before the trial court does not disclose any extenuating circumstances.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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P.C.M. Ngulube
COURT OF APPEAL JUDGE

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B.M. Majula
COURT OF APPEAL JUDGE