

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 123/2021

HOLDEN AT LUSAKA

(APPELLATE JURISDICTION)

BETWEEN:

**YOTAM KAO NKHOMA** against the decision of the High Court Judge (Mulenga J, as she then was) in terms of

**THE PEOPLE** **RESPONDENT**

**CORAM :** **Hamaundu, Mutuna and Chinyama JJS**

**DATES OF HEARING AND SENTENCING:** **On 13<sup>th</sup> July 2021 and 10<sup>th</sup> August 2021**

**For the Appellant :** **Mr. I. Yambwa of Legal Aid Board**

**For the Respondent :** **Mrs. M. Hakasenke – Simuchimba of National Prosecutions Authority**

## **JUDGMENT**

**Mutuna, JS delivered the judgment of the court.**

Cases referred to:

- 1) **Mutambo and others v The People (1965) ZR 15**
- 2) **R v Hochman, Vokey and Peebles (1956) 113 CCC 319**
- 3) **Tabo v The People (1999/92) ZR 140**
- 4) **George Musupi v The People (1978) ZR 437**

Legislation referred to:

- 1) **Penal Code, Cap 87**
- 2) **Criminal Procedure Code, Cap 89**

Works referred to:

having an inappropriate relationship with the deceased.

**1) Blackstone's Criminal Practice, by Peter Murphy, Blackstone Press,  
1992**

**Introduction**

- 1) This is an appeal against the decision of the Learned High Court Judge (Mulenga J, as she then was) in terms of which, the Appellant was convicted of one count of murder and sentenced to 35 years imprisonment with hand labour.
- 2) The appeal contests the conviction and sentence. It is contended that it was a misdirection on the part of the Learned High Court Judge to convict the Appellant based on circumstantial evidence because it did not attain the standard required by law.

**Background**

- 3) The background to this appeal is that on 25<sup>th</sup> February 2013 the deceased, one Lucius Mkandawire, was found dead in a bush near his village situate in Lundazi District, Eastern Province. Prior to this, there were rumours circulating in the village that the Appellant's wife was having an inappropriate relationship with the deceased.

- 4) After the police recovered the body of the deceased and conducted investigations, they initially interrogated Masiye Moyo, who testified as PW3 in the court below, as a suspect for the offence because he was the last person seen with the deceased. During the interrogation PW3 revealed that the Appellant may have had a motive to kill the deceased because of the rumours circulating in the village.
- 5) The police turned their focus away from PW3 and launched a manhunt for the Appellant which resulted in his arrest at Lusaka's intercity bus terminal.

#### **Proceedings in the High Court and Decision by the Judge**

- 6) The prosecution called a number of witnesses whose collective evidence revealed the rumours circulating in the village that the deceased had been having an inappropriate relationship with the Appellant's wife. As a consequence of this, a meeting was convened by the Appellant's father-in-law, (PW4), to which the Appellant was invited but he declined to attend. In refusing to attend the meeting, he

indicated that he knew what he would do about the deceased's inappropriate relationship with his wife.

- 7) The evidence revealed further that PW4 was informed by his daughter, the Appellant's wife, that on the fateful day she had noticed the Appellant leave their house carrying a bicycle fork which was later found beside the body of the deceased. In addition, she had told him that the Appellant had taken away her clothes for reasons known to himself.
- 8) In his defence, the Appellant denied the killing and explained that on the material day he had travelled to Malawi to purchase beans, which he later took to Lusaka for resale.
- 9) At the close of hearing, the Learned High Court Judge began her consideration by acknowledging that since there were no eye witnesses to the commission of the offence, the only available evidence was the circumstantial evidence. She then considered three issues raised in the Appellant's submissions contending: dereliction of duty by the arresting officer in his failure to up-lift finger prints from the bicycle fork; dereliction of duty by the police due to their failure to investigate PW3 who was the last person

seen with the deceased; and, that the Appellant's wife as an incompetent witness, could not give evidence by proxy through her father PW4.

- 10) In her decision, the Learned High Court Judge dismissed all the three contentions. She found, in respect of the first contention, that the explanation given by the arresting officer regarding his failure to up-lift finger prints from the bicycle fork was acceptable. Further, she found that the arresting officer had investigated the likelihood of PW3 having committed the offence and that the investigation revealed that the two were best friends and did not quarrel on the material day.
- 11) Last, the Learned High court Judge held the evidence of PW4 on his narration of what the Appellant's wife told him to be admissible on the ground that it was not hearsay evidence. She based her decision on the case of **Mutambo and Others v The People<sup>1</sup>** and said the evidence was admissible to prove that the statement was made and not for its truthfulness.
- 12) The Learned High Court Judge then considered whether the circumstantial evidence was sufficient to permit an

inference of guilt. She quoted a passage from a Canadian case **R v Hochman, Vokey and Peebles**<sup>2</sup> that circumstantial evidence does not require to establish guilt with mathematical precision. All that is required for a conviction is moral certainty that all the bits and pieces of the evidence, when taken together into one coherent picture point to the guilt of the accused as the only reasonable inference.

- 13) Applying her reasoning in the preceding paragraph to the facts of the case, the Learned High Court Judge summarized the links to the chain of circumstantial evidence which established the guilt of the Appellant as follows:

- 31.1 there were strong rumours that the deceased was having an inappropriate relationship with the Appellant's wife;
- 31.2 the appellant was aware of these rumours but refused to attend the meeting called by PW4 to resolve the differences between himself, his wife and the deceased;
- 13.3 After the meeting was called, PW4 was informed that the Appellant had taken away his wife's clothes;

13.4 shortly after the deceased was killed, the Appellant left the village and never returned until he was apprehended.

- 14) The Learned High Court Judge emphasized the fact that the Appellant was aware of the rumours and was of the firm view that this is what motivated him to commit the offence. She declined to accept the Appellant's explanation that his absence from the village was due to the fact that he had travelled to Malawi to purchase beans for resale at Lusaka. Instead, she accepted the evidence of PW4 that the Appellant had never engaged in trading especially that the Appellant acknowledged that he did not tell his family that he was going to Malawi or Lusaka.
- 15) In conclusion, the Learned High Court Judge found that the Appellant's departure for Lusaka was not a coincidence but revealed a guilty mind. Therefore, the circumstantial evidence evidence was sufficient to permit the inference of guilt.

#### **Appeal to this Court and arguments by counsel**

- 16) The Appellant is aggrieved by the decision of the Learned

High Court Judge and has appealed to this Court fronting one ground of appeal. The ground of appeal contests the conviction alleging that it was wrong because the circumstantial evidence upon which it was based did not attain the acceptable legal standard.

- 17) The arguments presented by Mr. I. Yambwa, counsel for the Appellant, challenged the fact that the Learned High Court Judge placed emphasis on the rumours circulating in the village regarding the alleged inappropriate relationship between the deceased and Appellant's wife as a basis of finding that he had motive to commit the offence. He argued that, although the Appellant did not bear the burden of proving his innocence, he had given an acceptable explanation regarding the case which negated the prosecution's case.
- 18) Mr. I. Yambwa took his argument further by contending that the Court should not have admitted the evidence of PW4 which narrated the discussion he had with his daughter, the Appellant's wife, because it was hearsay evidence. Counsel reinforced his argument by referring to the passage from the decision of the Court of Appeal in the

**Mutambo<sup>1</sup>** case referred to by the Learned High Court Judge, on the fate of hearsay evidence. This evidence, he argued, was tainted further by the fact that it revealed what an incompetent witness said. Counsel also criticized the omission by the arresting officer to up-lift finger prints from the bicycle fork and said the omission should have been resolved in favour of the Appellant.

- 19) The last limb of counsel's argument addressed the evidence tendered by PW3. He argued that as the last person seen with the deceased and who was initially interrogated for the offence, he should have been treated as a suspect witness in line with our decision in the case of **Tabo v The People<sup>3</sup>**. Counsel argued that as such witness, the evidence of PW3 required corroboration. We would like to pause here and note that counsel quoted the **Tabo<sup>3</sup>** case out of context because it deals with confessions and not evidence of suspect witnesses.
- 20) In addition, counsel argued that there was need for the arresting officer to investigate the association of PW3 with the deceased on the fateful day. The omission was a

dereliction of duty which should result in the acquittal of the Appellate.

21) The Respondent filed heads of argument opposing the appeal. However, when we engaged counsel for the Respondent at the hearing, Mrs. Hakasenke – Simuchimba indicated that the State did not support the conviction because part of the circumstantial evidence relied upon by the Learned High Court Judge was hearsay evidence. For this reason, we have not seen it fit to reproduce the content of the Respondent's heads of arguments because they have no bearing on the decision we have reached in this judgment.

### **Determination and decision by this court**

22) In our determination of this appeal, we have considered the record of appeal and arguments by counsel. The appeal contests the conviction based on circumstantial evidence. This evidence is set out at pages J6 to J7 of this judgment and the gist of the Appellant's argument is that it was based on PW4's evidence which was hearsay and a

narration of evidence given by an incompetent witness, thus inadmissible.

- 23) Counsel for the Respondent has been magnanimous and conceded that, in so far as the evidence of PW4 is a narration of what he was told by his daughter, who was not called to testify before the court, it was hearsay evidence and inadmissible. Counsel went further to confirm that, as such, there was a break in one of the links to the chain of circumstantial evidence.
- 24) We agree with the arguments by the Appellant and concession by the Respondent that the evidence of PW4 in so far as it related to what he was told by his daughter was hearsay evidence. The evidence, as is clear from the reasoning of the Learned High Court Judge was not, as she put it admissible, because it proved that the statement was made but rather believed it in arriving at her verdict of guilty. It is evident from her decision that it weighed heavily on her conclusion and she accepted that indeed, the fact of the Appellant having left his home with a bicycle fork had been proven.

25) The fate of PW4's evidence is compounded by the fact that it sought to introduce evidence of a person who would ordinarily not be a competent witness. The common law principles as to competence and compellability of witnesses have been set out in ***Blackstone's Criminal Practice by Peter Murphy (1992 edition)*** at page 1808 as follows:

**"The general rule relating to the competence and compellability of witnesses has two limbs:**

- (a) The first is that any person is a competent witness in any proceedings. The exceptions to this limb relate to the accused, children, and persons of defective intellect;**
- (b) The second is that all competent witnesses are compellable. The exceptions to this limb relate to the accused and his or her spouse."**

Put simply save for the specific exceptions stated above, all persons are competent witnesses and are compellable as long as they do not fall in the category of those who are exempt. Consequently, at common law, spouses are competent witnesses because they do not have the incapacities that would render them incompetent. They are, however not compellable witnesses.

- 26) Counsel for the Appellant had argued in the High Court that in terms of section 151 of the **Criminal Procedure Code** the Appellant's wife is not a competent witness. As such, her evidence could not be given through a proxy. The Learned High Court Judge did not make a ruling on this submission.
- 27) Section 151 of the **Criminal Procedure Code** prescribes instances where the wife or husband of an accused may be called to testify without the consent of the accused. It states as follows:

**“(1) In any inquiry or trial, the wife or husband of the person charged shall be a competent witness for the prosecution or defence without the consent of such person-**

- (a) in any case where the wife or husband of the person charged may, under any law in force for the time being be called as a witness without the consent of such person;**
- (b) in any case where such person is charged with an offence under Chapter xv of the Penal Code or with bigamy;**
- (c) in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them ...”**

The effect of Section 151 is that it acknowledges the common law principle that a spouse is a competent but not compellable witness. It however, prescribes an exception to compellability in the cases involving the offences under subsections (1)(a), (b) and (c).

- 28) Applying what we have stated in the preceding paragraph to the matter with which we are engaged, we are of the firm view that since the offence with which the Appellant was charged was not one of those prescribed in the subsections of section 151, his spouse could not testify against him either directly or indirectly, without his consent. To the extent, therefore, that the Learned High Court Judge indirectly received the evidence of the Appellant's spouse, without his consent, she misdirected herself.
- 29) Consequently, a link in the chain of circumstantial evidence relied upon by the Learned High Court Judge was broken as the evidence of PW4 was not admissible for being hearsay and contravening section 151. Due to this break, the circumstantial evidence, did not take the case

out of the realms of conjecture so that it attained a degree of cogency which could permit only an inference of guilt.

- 30) Our decision in the preceding paragraph is reinforced by the fact that the evidence of the arresting officer (PW6) was also tainted with what he was told by the Appellant's wife which evidence was inadmissible. The witness's narration regarding the bicycle fork was based solely on the interview which he had with the Appellant's wife. Further, the witness did concede that he did not up-lift finger prints from the bicycle fork. In making her determination, the Learned High Court Judge, in dismissing the Appellant's contention that this was a dereliction of duty, justified the omission by taking judicial notice of the fact that the Police Service in this country does not have facilities for DNA testing. She also found that it had rained on the material day, therefore, no finger prints could be uplifted.
- 31) The burden of proof lay with the prosecution and all these issues raised by the Appellant on omission of up-lifting of finger prints weakened the prosecution's case. The fact in and of itself, that the State does not have facilities for DNA testing, does not mean the burden they shouldered of

proving the Appellant's guilt beyond reasonable doubt had been lessened. Further, the Learned High Court Judge glossed over the need for PW6 to investigate PW3 as the last person seen with the deceased. What is apparent from PW6's testimony is that he was rather excited and persuaded by the revelation by PW3 that the deceased had been engaged in an inappropriate relationship with the Appellant's wife and quickly shifted his attention from PW3 to the Appellant.

- 32) At the trial, the evidence of PW3 was crucial because it revealed the motive and indeed, was what shifted the police's attention from him to the Appellant. He was clearly a witness with a purpose of his own to serve having earlier been interrogated for the offence, such that, there was need for the Learned High Court Judge to be satisfied that the danger of relying on PW3's evidence as a suspect witness had been excluded. This is in line with what we have said in a plethora of authorities including the case of ***George Musupi v The People***<sup>4</sup>. A perusal of the record of appeal shows that the Learned High Court Judge did not

address her mind to this fact which prejudiced the Appellant's case.

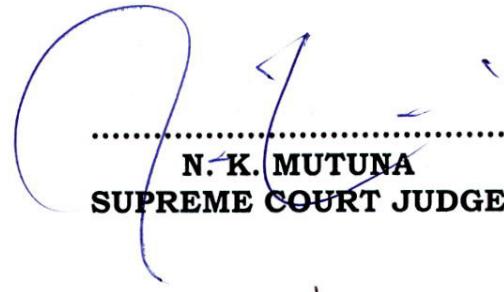
- 33) For the foregoing reasons we find that the conviction is unsafe and based solely on the rumours circulating in the village. The ground of appeal must succeed.

### **Conclusion**

- 34) The ground of appeal having succeeded we uphold the appeal and set aside the Appellant's conviction and sentence. We accordingly acquit the Appellant forthwith.

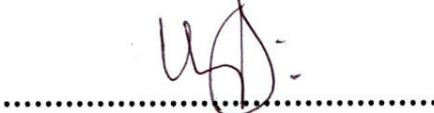


E. M. HAMAUNDU  
SUPREME COURT JUDGE



N. K. MUTUNA

SUPREME COURT JUDGE



J. CHINYAMA

SUPREME COURT JUDGE