

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA AND NDOLA
(Criminal Jurisdiction)

Appeal No.25/2022

BETWEEN:

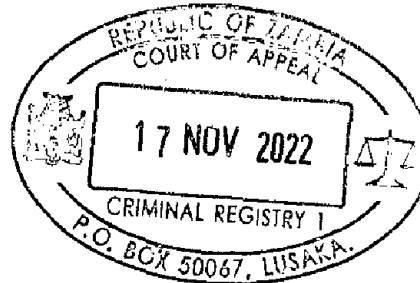
MISHECK GOMA

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Chishimba and Muzenga, JJA

On: 20th September 2022 and 17th November 2022

For the Appellant: I. Yambwa, Senior Legal Aid Counsel,
Legal Aid Board

For the Respondents: M. Kamwi, Senior State Advocate,
National Prosecution Authority

J U D G M E N T

Mchenga DJP, delivered the judgment of the court.

Cases referred to:

1. David Zulu v. The People [1977] Z.R. 151
2. Patrick Sakala v. The People [1980] Z.R. 205
3. Saluwema v. The People [1964] Z.R. 4
4. Dorothy Mutale and Another v. The People [1995-1997]
Z.R. 227
5. Crispin Soondo v. The People [1981] Z.R. 302
6. Leonard Yonah Jere v. The People CAZ Appeal No. 102 of
2019

Legislation referred to:

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

1. INTRODUCTION

1.1. The appellant appeared before the High Court (Limbani J.), on a charge of murder contrary to **Section 200 of The Penal Code.**

1.2. He denied the charge and the matter proceeded to trial.

1.3. At the end of trial, he was found guilty of committing the offence and condemned to suffer capital punishment.

1.4. He has appealed against the conviction.

2. EVIDENCE BEFORE THE TRIAL COURT

2.1. On the 27th of November 2018, around 09:00 hours, the body of Jean Kaila, the appellant's wife, was recovered from Kalingwi River. The body was recovered about 20 meters from the appellant's house in Mpundu village, in Chama.

2.2. It was found on the sand bank facing downwards. The clothes were dirty and there were drag marks suggesting that it was pulled to the point where it was discovered.

2.3. The appellant was apprehended soon after the discovery of the body.

2.4. His story was that he spent the night of 26th November 2018, with his wife in their house. The night was without incident, a fact that their daughter confirmed in court.

2.5. His daughter also told the trial Judge that she left both her parents at home on the morning that the body was discovered.

2.6. The appellant told the trial Judge that when he woke up, he found the door to their house open. He was not alarmed because it was his wife's habit to go to the fields early in the morning.

2.7. His testimony on who left the house first, between him and his daughter, was not clear.

2.8. A post-mortem examination established that the appellant's wife died from two head injuries.

3. FINDINGS BY THE TRIAL JUDGE

3.1. The trial Judge recognised that the case against the appellant was anchored on circumstantial evidence.

3.2. He ruled out the possibility that she drowned or was killed at the stream, because of the drag marks.

3.3. The trial Judge noted that the appellant was the last person to be seen with the wife, when she was alive.

3.4. He also noted that the appellant's narration on who left the house first, his daughter or his wife, was contradictory.

3.5. He found that it was contradictory because it was an afterthought and that he deliberately intended to mislead the court. He also found that the appellant failed to give a reasonable account of what happened to his wife.

3.6. The trial Judge concluded that the only inference that could be drawn on the evidence that was before him, was that the appellant murdered his wife.

4. **GROUND OF APPEAL AND ARGUMENTS IN SUPPORT AND AGAINST**

4.1. The sole ground of appeal is that an inference of guilt, is not the only inference that could have been drawn on the evidence that was before the trial Judge.

4.2. In support of this ground of appeal, Mr. Yambwa referred to the cases of **David Zulu v. The People¹**, **Patrick Sakala v. The People²**, **Saluwema v. The People³**, **Dorothy Mutale and Another v. The People⁴** and **Crispin Soondo v. The People⁵** and submitted that the fact that the appellant was the last person to be seen with his wife alive, should not have been the basis for the conviction.

4.3. In the absence of evidence of any quarrel or difference between the appellant and his wife, there was no basis for concluding that the appellant inflicted the injuries that caused his wife's death.

4.4. Ms. Kamwi, who appeared for the state did not support the conviction.

4.5. She referred to the case of **Leonard Yonah Jere v. The People⁶** and submitted that considering all the circumstances of this case, the fact that the appellant was the last person to be seen with his wife, should not have been the basis for drawing the inference that he murdered her.

5. DECISION OF THE COURT

5.1. In the case of **Leonard Yonah Jere v. The People⁶**, as was submitted by Ms. Kamwi, we held that the mere fact that an accused person was the last person to be seen with the deceased person, cannot always lead to a conclusion that he was responsible for the death of that person.

5.2. In addition, we said the following:

"the last seen theory espouses the principle that when an accused person was the last person to be seen with the deceased, the trial Judge will have to take into consideration the time lapse i.e the time the appellant was last seen with the deceased and the time that the deceased was subsequently found dead. The other issue to consider is the explanation that is tendered by an accused regarding what could have transpired after he was last seen in the company of the deceased. The explanation is one that would exonerate the accused as being the perpetrator as it offers a possibility of someone else being the perpetrator"

5.3. In this case, in addition to considering the fact that the appellant was the last person to be seen with his wife alive, the trial Judge also considered the appellant's account of who left the house first on the morning his wife's body was discovered.

5.4. He found that the person who left the house first was not the appellant, but his daughter. In

addition, he found that the appellant gave a contradictory account of what happened and concluded that he had failed to give a reasonable explanation of what happened to his wife.

5.5. It is our view that given the circumstances of this case, the trial Judge should have gone further and considered all the circumstances of the case and not anchor the conviction on that contradiction.

5.6. We find that the conviction was anchored on the contradiction because it was the basis of rejecting the appellant's explanation of what happened that morning.

5.7. In this case, the evidence did not point at any hostility between the appellant and his wife, the last time they were seen together. The evidence suggested that the relationship between the duo was cordial.

5.8. Further, the appellant did not display any unusual conduct, that would have pointed at him committing the offence or even raising suspicion, on that day. He went about his business like any normal husband.

- 5.9. When he was informed of the discovery of his wife's body, he made himself available, without incident.
- 5.10. Even though there is no need to prove motive in a charge of murder, the existence of a motive to harm, can, in appropriate cases, be one of the strands of circumstantial evidence.
- 5.11. In this case, there was no evidence that the appellant may have had reason to want to harm his wife.
- 5.12. The discovery of the body a few meters from their house, may raise suspicion but that is just about it.
- 5.13. Further, there was evidence suggesting that she was just dragged to that point, but that evidence does not point at where she could have been dragged from and by whom.
- 5.14. All in all, it is our view that the evidence that was before the trial Judge fell far short of evidence that would anchor a conviction on "the last seen theory".

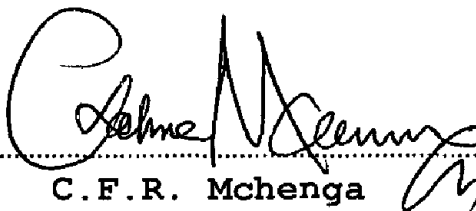
5.15. Consequently, we find that an inference of guilt, is not the only inference that could have been drawn on the evidence that was against the appellant.

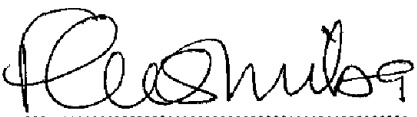
5.16. This being the case, we find merit in the sole ground of appeal.

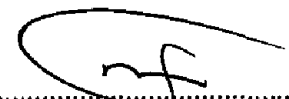
6. Verdict

6.1. Having considered all the circumstances of this case, we find that the conviction is not safe.

6.2. We allow the appeal and set aside the conviction and the sentence.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


.....
F.M. Chishimba
COURT OF APPEAL JUDGE


.....
K. Muzenga
COURT OF APPEAL JUDGE