IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 67/2022
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

STEPHEN MUSONDA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Chishimba and Muzenga, JJA
On 15th November, 2022 and 22nd August, 2023.

For the Appellant: Mrs. M. Makai – Senior Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. C. Sakala – Senior State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Daka v. The People – SCZ Appeal No. 333 of 2013**
2. **Dorothy Mutale and Richard Phiri v. The People (1997) SJ 51**
3. **Whiteson Simusokwe v. The People – SCZ Judgment No. 15 of 2002**
4. **Beatrice Mwala Hangwende & 3 Others v. The People – SCZ Selected Judgment No. 13 of 2016**

5. **Memory Nambela and Another v. The People – CAZ Appeals No. 165,166 of 2020**
6. **Saidi Phiri v. The People – SCZ Selected Judgment No. 30 of 2015**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 The appellant was sentenced to death by Kafunda J following a conviction of murder.

1.2 The particulars of offence alleged that on 25th June, 2021 at Solwezi in the North-Western Province of the Republic of Zambia, the appellant murdered Mercy Makumano.

2.0 PROSECUTION EVIDENCE IN THE COURT BELOW

2.1 The prosecution secured the conviction of the appellant on the evidence of eleven prosecution witnesses. A summary of the evidence against the appellant was that on the fateful day, the appellant came back from work, and gave his wife, the deceased K100.00 to do her hair. He then returned to work and the deceased went to the market

on the pretext of doing her hair. She instead went to pick up PW2 and went to PW2's bar to drink beer around 13:00 hours.

2.2 The appellant returned home around 19:00 hours and found the deceased had not returned. He called her twice on her cellphone and she told him that she was almost done with plaiting her hair. PW2 left the bar at 21:00 hours leaving the deceased with PW2's husband (PW3) and two other people among them PW4. According to PW3 and PW4, the appellant followed the deceased at the bar around 22:00 hours, dragged her out of the bar and left. The deceased was discovered in the early hours of the following day in an incomplete soak away at an unfinished house.

2.3 When asked by PW5 how she found herself in the soak away she stated that she was separating a fight. The appellant was notified of this and he left his home, went to the scene, retrieved the wife, went to the police and then the clinic and subsequently to the hospital where she was admitted and passed on the next day.

2.4 PW3 was detained in police custody and PW4 was summoned to the police over the death of the appellant's wife being the people who were last with the deceased prior to her death.

2.5 After considering the evidence of the prosecution witnesses, the trial court found the appellant with a *prima facie* case and was placed on his defence. He opted to give evidence on oath and called no witnesses.

3.0 DEFENCE

3.1 In his defence, the appellant told the trial court that when he knocked off from work around 18:00 hours, he found his wife was not at home. He called her twice and she told him that she was still at the saloon. Seeing that it was getting dark, PW1 cooked food and he ate with the children. According to him, he retired to bed around 20:00 hours and the following morning he was visited by a police officer who asked him where his wife was. He told him that the deceased did not return home the previous night. He told the trial court that the police informed him that his wife was found in a soak away at an unfinished house and he accompanied them to the scene.

3.2 When they reached the scene, he immediately went into the soak away where his wife was. He called her by name and the deceased responded by saying that she needed water to drink. He quickly arranged for people to help him remove the deceased from the soak

away and they took her to the police station where they were issued with a medical report form. He stated that he noticed that the deceased had an injury on her private parts and she was bleeding a lot. When they reached the clinic an ambulance immediately took her to Solwezi General Hospital where she died from her injuries the following morning. He told the trial court that at the scene he saw a stick which had blood stains.

3.3 In cross-examination, he denied following the deceased at PW3's bar at night and he denied grabbing and slapping the deceased from the bar on the fateful night. He stated that the prosecution witnesses were merely trying to implicate him as they were the last persons to be seen with the deceased.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 After careful consideration of the evidence before him, the learned trial judge found that the deceased succumbed to the fatal injuries inflicted on her on the fateful night. He also found that there was no direct evidence of who assaulted the deceased. The trial court further found that the circumstantial evidence against the appellant was the evidence

of PW1 the appellant's daughter whose evidence was received after a *voire dire,* evidence of PW2, PW3, and PW4.

4.2 The trial court found that the evidence of PW3 was corroborated by that of PW4. The learned trial judge further found that the circumstantial evidence given by the prosecution witnesses was so overwhelming and took the case out of the realm of conjecture and is so cogent to permit only an inference of guilt.

4.3 The appellant was found guilty and accordingly convicted of the offence of murder. The trial judge went further to find no extenuating circumstances and sentenced the appellant to death.

5.0 GROUNDS OF APPEAL

5.1 Unsettled with the conviction, the appellant appealed to this court advancing three grounds of appeal couched as follows:

(1) The lower court erred in law and in fact by proceeding on a defective *voire dire* and ruling.

(2) The lower court erred in law and in fact when it convicted the appellant on circumstantial evidence which had not proved the case beyond all reasonable doubt.

(3) In the alternative, the lower court erred in law and in fact when it failed to hold that there were extenuating circumstances to warrant any other sentence than the death sentence.

6.0 THE APPELLANT'S ARGUMENTS

6.1 In support of ground one of the appeal, learned counsel for the appellant contended that the *voire dire* conducted by the lower court was defective as the ruling did not state whether the child was possessed of sufficient intelligence and understood the duty to speak the truth. It simply stated that: **"To give evidence on oath."**

6.2 It was contended that, the trial court instead, stated in its judgment it was satisfied that the child possessed sufficient intelligence and appreciated the duty to tell the truth. We were urged to expunge the evidence of PW1. Reliance was placed on the case of **Richard Daka v. The People**[1] among others.

6.3 In support of ground two, it was learned counsel's contention that the circumstantial evidence on record does not only lead to one conclusion. It was contended that when the deceased was asked what had happened to her she stated that she was separating two people who were fighting. According to Mrs. Makai, it was possible that the appellant was assaulted by other unknown people. We were referred to the case of **Dorothy Mutale and Richard Phiri v. The People**[2] where it was held that:

> **"Where two or more inferences are possible, it has always been a cardinal principle of the criminal law that the Court will adopt the one, which is more favourable to an accused if there is nothing in the case to exclude such inference."**

6.4 We were urged to acquit the appellant and set him at liberty as the prosecution failed to prove his case beyond all reasonable doubt.

6.5 Ground three was argued in the alternative. It was contended that the appellant assaulted his wife because he was provoked by her behaviour of lying that she was plaiting hair at the salon when in fact she was on a drinking spree and failed to return home until late at night when the appellant went to fetch her from a tavern in the company of male folks. In support of the argument, we were referred to the case of **Whiteson Simusokwe v. The People**[3] where it was held that:

> **"A failed defence of provocation affords extenuation for a charge of murder."**

6.6 We were urged to allow the appeal.

7.0 RESPONDENT'S ARGUMENT

7.1 On behalf of the respondent, the learned counsel conceded that the trial court erred in law and in fact by proceeding on a defective ruling on the *voire dire*. Counsel urged us to discount the evidence of PW1.

7.2 In responding to ground two, it was submitted that the trial court did not err in convicting the appellant on circumstantial evidence which was so cogent enough to prove the case beyond reasonable doubt. It was contended that it is clear from the evidence on the record that the appellant was the last person to be seen with the deceased. According to counsel, the evidence of PW4 corroborated the evidence of PW3 thus removing the danger of convicting on the evidence of a suspect witness.

7.3 In responding to ground three, it was contended that the trial court was on firm ground in finding that there were no extenuating factors to warrant any other sentence other than death. It was contended that the appellant in his defence denied having committed the offence and thus the trial court could have not found that there were extenuating factors. We were referred to the case of **Beatrice Mwala Hangwende & 3 Others v. The People**[4] where it was held *inter-alia* that:

> **"There were no extenuating circumstances in the case as the appellants denied having committed the offences and failed to prove any defence, or facts**

associated with the commission of the offence which diminished morally the degree of their guilt as it was their duty to bring out any extenuating factors."

7.4 We were urged to dismiss this appeal against conviction and sentence as it lacked merit.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the evidence led in the court below, the judgment of the trial judge as well as the submissions advanced by the parties.

8.2 The first ground of appeal assails the trial judge's conduct of the *voire dire.* The law on how a *voire dire* is conducted is well settled. **Section 122(a) of the Juveniles Act**[2] provides that:

"Where, in any criminal or civil proceedings against any person, a child below the age of fourteen is called as a witness, the court shall receive the evidence, on oath, of the child, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the child's evidence, on oath, and understands the duty of speaking the truth...."

8.3 The learned trial court complied with the requirement for conducting a *voire dire* at the end of which it rendered a Ruling. It is this Ruling which both counsel have taken issue with. The Ruling simply stated: **"to give evidence on oath."** The Supreme Court in the case of **Richard Daka** *supra* held that:

> **"In the instant case, the *voire dire* in contention is found at page 10 and 11 of the record of proceedings. The Court concluded that the child possessed sufficient intelligence to give evidence on oath but it did not specifically state that the child understood the importance of telling the truth. Therefore from the requirements of the law under Section 122 of The Juveniles Amendment Act, 2011, we are satisfied that the *voire dire* was defective. We therefore allow this third ground."**

8.4 In the case of **Memory Nambela and Another v. The People[5],** we excluded evidence of a child after the Ruling by the trial court did not satisfy the two tier test as espoused in the **Richard Daka** case *supra.* We thus have no hesitation in agreeing with both counsel that the ruling of the trial court was defective, consequently rendering the *voire dire* defective. We therefore allow ground one of the appeal and entirely discount the evidence of PW1.

8.5 We move on to consider ground two of the appeal which attacks the cogency of the circumstantial evidence. Mrs. Makai spiritedly argued that there being no one who saw the appellant commit the offence he is charged with, the circumstantial evidence the trial court relied on was so weak that it permits more than one inference. She pointed out that when PW5 asked the deceased what had happened, the deceased indicated that she was separating a fight when she fell in the unfinished soak away. On the other hand, Mr. Sakala, on behalf of the State indicated that the circumstantial evidence on the record was so cogent to prove the case beyond all reasonable doubt. According to the State, the appellant was the last person to be seen by the deceased.

8.6 In order to convict based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of the accused's guilt.

8.7 In the case of **Saidi Phiri v. The People**[6], the Supreme Court guided that:

> **"Where the prosecution's case depends wholly or in part on circumstantial evidence, the court is, in effect, being called upon to reason in a staged**

approach. The court must first find that the prosecution evidence has established certain basic facts. Those facts do not have to be proved beyond all reasonable doubt. Taken by themselves, those facts cannot, therefore, prove the guilt of the accused person. The court should then infer or conclude from a combination of those established facts that a further fact or facts exist. The court must then be satisfied that, those further facts implicate the accused in a manner that points to nothing else but his guilt. Drawing conclusions from one set of established facts to find that another fact or facts are proved, clearly involves a logical and rational process of reasoning. It is not a matter of casting any onus on the accused, but a conclusion of guilt a court is entitled to draw from the weight of circumstantial evidence adduced before."

8.8 In his defence, the appellant told the trial court that he never left his house until the following day when he was informed that his wife had been found in an unfinished soak away and that the trial court relied on the evidence of a suspect witness to convict the appellant. On the other hand, PW3 and PW4 told the trial court that around 22:00 hours on the fateful day, the appellant went to the bar, where he picked up the deceased and that the appellant was very annoyed. We note that PW3 was a primary suspect and he spent a number of days in police

cells. We agree with the learned counsel for the appellant that PW3 was a witness who had a possible interest to serve.

8.9 The learned trial court was alive to the fact that PW3 was a witness with a possible interest to serve, whose evidence requires corroboration in order to be believed. That is the reason it found corroboration in the evidence of PW4, hence eliminating the danger of relying on suspect evidence. We cannot fault the findings of the lower court in this regard. The appellant was clearly unsettled with the behaviour of the wife, followed her at the bar where she was drinking beer, slapped and forcibly took her from there, after which she was found injured in an incomplete soak away, not far from their home. The appellant denied having followed the wife at the bar, which explanation was rejected by the trial court. We have no reason to interfere with the finding in that regard.

8.10 In the circumstances, we cannot fault the trial court's finding to the effect that the circumstantial evidence was cogent to warrant only an inference of guilt. We thus find no merit in ground two and it thus suffers the same fate as ground one.

8.11 In arguing ground three, the learned counsel for the appellant submitted that the appellant was provoked by his wife's behaviour of lying that she was at the salon when in fact she was on a drinking spree in the company of other male folks and failed to return home on time until when the appellant went to fetch her from a tavern. On the other hand, the State submitted that the appellant in his defence denied having committed the offence and thus the trial court could not have found that there were extenuating factors.

8.12 According to **Section 201(2) of the Penal Code** an extenuating circumstance is any fact associated with the offence which would diminish morally the degree of the convicted person's guilt. The learned trial judge in the present case found that there were no extenuating circumstances on the facts before him.

8.13 The undeniable facts of this case are that the deceased requested the appellant to give her money to do her hair, which he did. Upon knocking off, the appellant did not find his wife, the deceased, at home and that he called her several times. She kept on saying that she was on her way until late in the night when he followed her at the bar and found her drinking beer. He was visibly angry, slapped her and dragged her

out of the bar. Clearly the conduct of the deceased was highly unacceptable, being a wife and mother, especially in the compounds in which they lived. These facts clearly fall within the ambit of extenuating circumstances envisaged by **Section 201 of the Penal Code,** as they diminish morally the appellant's guilt. We therefore find that extenuating circumstances exist. Had the learned trial court properly directed itself, it would certainly have found as we have.

8.14 We thus find merit in ground three and we allow it.

9.0 CONCLUSION

9.1 We find no merit in grounds one and two of the appeal and we dismiss them.

9.2 Having found merit in ground three, we set aside the sentence of death and in its place we impose a sentence of 30 years imprisonment with hard labour effective 26th June, 2021, the date he was taken into custody.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE