

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

HP/06/2016

BETWEEN:

THE PEOPLE

v

DAVISON MTONGA
VICTOR MUNDIA
HUMPHREY MUNDIA



BEFORE THE HONOURABLE LADY JUSTICE M.CHANDA
THIS...^{16TH}DAY OF...^{JUNE} 2017

APPEARANCES

FOR THE PEOPLE : C.NGOMA
FROM NATIONAL PROSECUTION
AUTHORITY

FOR THE ACCUSED : H.M.MWEEMBA AND K. MWEEMBA
FROM LEGAL AID BOARD

J U D G M E N T

LEGISLATION REFERRED TO:

1. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA
2. THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA

CASES REFERRED TO:

1. David Zulu v The People (1977) ZR 151
2. Saluwema v The People (1965) ZR 4
3. Oxford Dictionary of Law, Fifth edition, Oxford University Press, 2002
4. Danny Zyambo v The People (1977) ZR 53

5. Yotam Manda v The People (1988 – 89) ZR 129

This judgment is in respect of **Davison Mtonga** and **Victor Mundia** (also referred to as A1 and A2). **Humphrey Mundia** was found with no case to answer hence the case against him was dismissed and he was acquitted forthwith.

The accused were jointly charged with one count of the offence of murder contrary to *section 200 of the Penal Code Chapter 87 of the Laws of Zambia*. The particulars of the offence alleged that A1 and A2 on a date unknown but between the 12th and 13th day of July, 2015 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia did murder **Prudence Lumano**. When called upon to plead, the accused denied the charge. The prosecution then called twelve witnesses in aid of their case.

In order to establish the guilt of the accused, the prosecution must satisfy me on all the ingredients of the offence charged. The elements of the offence of murder are stipulated in *section 200 of the Penal Code*. The prosecution is therefore required to establish three elements namely that –

- (1) the accused person caused the death of the deceased;
- (2) by an unlawful act; and
- (3) with malice aforethought.

Pursuant to *section 204 of the Penal Code*, malice aforethought is established when it is proved either that the accused had an actual intention to kill or to cause grievous harm to the deceased or that the accused knew that his actions would be likely to cause death or grievous harm to someone.

Grievous harm is interpreted in section 4 of the Penal Code as any harm which endangers life or which amounts to a maim or which seriously or permanently injures health or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.

I will now consider the evidence in this case.

Aloncias Mwanza was the first prosecution witness (**PW1**). In his evidence in chief, PW1 narrated that on 12th July, 2015, he had made arrangements to meet with his girlfriend, Prudence Lumano, at a bar called Happy People in John Laing compound. PW1 explained that when he arrived at the bar, he saw his girlfriend being embraced by a man whom he did not know. Upon seeing that, PW1 decided to proceed to his house which was situated close to the bar. According to PW1, when Prudence realised that he had left, she immediately went after him.

PW1 recounted that when they reached his house, he asked Prudence to leave and requested that they swap their phones which they had earlier exchanged. He related that soon after, Prudence's brother-in-law Bruce went there to ask Prudence to arrange for him to see his child. PW1 went on to testify that after Bruce left, an argument ensued between the two which according to PW1 infuriated Prudence and led her to break PW1's phone. He further testified that around 20:30hours, Prudence told PW1 that she was proceeding to a place called African Braai to drink some beer.

The witness stated that he remembered calling Prudence the following day but her phone was not reachable. He further stated that he came to learn of his girlfriend's death later that day when Prudence's sister informed him of her demise.

In cross-examination, the witness admitted that he was upset and jealous when he found the deceased embracing with a man at the bar. He also stated that he and the deceased quarrelled over the issue but they reconciled afterwards and even had sexual intercourse. When asked why he did not accompany Prudence especially with the killings that were heard of in that area, the witness responded that he intended to escort her but when he went outside, he found that she had already left.

The second prosecution witness was **Ricky Nyambepo (PW2)**. PW2 testified that on 12th July, 2015 around 15:00hours, he was at his shop when A1 who was his dependant went and told him that he was going to Humphrey's house to watch a football match.

PW2 informed the court that on that day, he left his shop at about 22:00 hours but when he reached home, he was surprised to learn that A1 had not returned. The witness said that A1 spent the night away and did not return at all.

PW2 testified that the following morning around 07:40 hours, A1 phoned him using an unfamiliar number to apologise for spending the night out and explained that he did so because the football match had finished late. PW2 recalled that he found A1 at the shop the following day after he knocked off from his work at about 18:00 hours. He said that A1 had a nokia phone which he offered to sell to him. When PW2 asked A1 where he had obtained the phone, he said it was given to him by A2. The witness indicated that after negotiating the price with A1, he bought the phone at K35.00. He informed the court that when the phone was handed to him, it did not have a sim card.

PW2 narrated that months later, on 24th August, 2015 he was apprehended by some policemen who demanded to know where he had obtained the phone. PW2 explained that he had bought

the phone from A1 but A1 could not be found at that time. He said he remained in custody and was only released when A1 was apprehended.

In cross-examination, PW2 stated that he did not know that A1 picked up the phone and came to hear of that position when he was in custody.

PW3 was **Oment Kasondela** of Kafue Waterworks who testified that in September, 2015 he received a phone call from A1's uncle informing him that there was a manhunt for A1 because of a phone he had picked up in Lusaka. According to the uncle, the phone was said to have belonged to a person who was murdered. PW3 asserted that when he heard this, he went to pick up A1 and handed him over to Chibolya police station.

The fourth prosecution witness (**PW4**) was **Andrea Chimfwembe Kumwenda**, an application support engineer at MTN Zambia Limited. His testimony was that on a date he could not recall, he printed a call record for the deceased's MTN mobile phone number and presented it to Sergeant Phiri of Chibolya police post.

PW4 said the record showed among other things, the phone calls made from the deceased's sim card, the phone calls made from the deceased's phone with a different sim card and the area from which the phone calls were made. The call record

was produced in court as part of PW4's evidence and was marked as exhibit "P2".

In cross-examination, PW4 said the report also showed that a different sim card was later inserted and used in the deceased's phone.

The fifth prosecution witness (**PW5**) was **Chitalu Chibeta**, a lawyer at Airtel Zambia who told the court that on 21st August, 2015 she printed out a call record for Ricky Nyambepo's sim card. According to PW5, the record showed that Ricky was using his sim card in the deceased's phone. She asserted that she was able to know this as the first fourteen digits of the serial number on the record were the same as the serial number found on the deceased's phone. She explained that despite the last digit between the serial number on the phone and that on the call record being different, this was standard as the record always hid the last digit and reflected it as zero. The call record generated by Airtel was produced in Court and marked as exhibit 'P3'.

There were no issues raised in cross examination.

PW6 was **Victor Shamapango** a crime technician at Lusaka criminal investigation division. His testimony was that on 13th July, 2015, he visited the crime scene where the body of the

deceased was discovered and took some pictures which he showed to the court. According to PW6, the body of the deceased was lying on the ground of a makeshift shelter, facing upwards. He told the court that from his observation, the deceased's neck and face were swollen and blood was flowing from her mouth. The body also had bruises below the waist. He further told the court that he suspected that Prudence was sexually assaulted by her assailants. PW6 produced before Court the photographic album which he had compiled and was marked as exhibit 'P4'.

In cross examination the witness was asked whether he picked any finger prints from the scene and his response was that he did not because it was impossible to lift finger prints from a person's body.

The seventh prosecution witness (**PW7**) was **Kennedy Chileshe** a detective sergeant operating from Chibolya police post who was the Investigations Officer in this matter. PW7 asserted that he was informed that Prudence owned a cellular phone and he went to MTN to get a call record for her phone number so as to know who was in possession of her phone at that time. He related that when he perused the record, he noticed that there was an outgoing call from the deceased's phone number to an Airtel number on 13th July, 2015 at 07:45 hours. At that point, Sergeant Phiri conducted a search at Airtel to establish who

was called on that date. The call record disclosed that the person called was Ricky (PW2). The call record further disclosed that sim card belonging to PW2 was now being used from the deceased's phone.

PW7 stated that when PW2 was apprehended on 24th August, 2015 he disclosed that he purchased the phone from A1. PW7 said that at that point, A1 had fled to Kafue and was only apprehended on 12th September, 2015. PW7 told the court that when A1 was interrogated, his response was that he picked up the phone on his way from African Braai where he had been drinking beer with A2 and Humphrey Mtonga. The witness stated that A1 led him to the place where he alleged to have picked the phone from. PW7 noted that the place was a few meters from where the deceased's body was found.

The witness told the court that on 10th October, 2015, he apprehended A2 and A3 and when A2 was interrogated, he identified the phone from Ricky as the one they had picked up. A2's narration with regards to how they came across the phone was similar to A1's but when he was asked to locate the place from where the phone was picked, he led PW7 to a different place from that of A1. A2 led PW7 to a place which was about 300 meters away from that of A2. The witness also produced the phone as part of his evidence and it was marked as exhibit 'P1'.

During cross examination, the witness stated that according to A1, he picked up the phone without any knowledge of the dead body. PW7 did not agree with the insinuation that another person could have killed the victim and left the phone which was later picked by A1. He said PW1 did not inform him that he had an argument with Prudence. He clarified that there was no eye witness to the alleged murder by the accused persons.

In further cross examination the witness stated that they could not do the DNA test because the forensic department told them that there was a lapse in time as such the results would be affected.

In re-examination, the witness said he was aware that a swab was taken from the deceased and when the accused persons were apprehended, there was a request for their specimens to be examined but they were informed that time had lapsed within which to do so.

PW7 further clarified that PW1 told him that he had sexual intercourse with prudence after they resolved their differences.

The eighth prosecution witness (**PW8**) was **Lwinza Chilando**. The gist of her testimony was that on the morning of 13th July, 2015 she went to the crime scene and identified the body of the

deceased. PW8 said she observed that the deceased had a swollen face with bites on the cheeks and blood was oozing out of her mouth. She also said the deceased's clothes were soiled, with the shirt raised up to her breasts and her trousers dropped down to her legs. PW8 further stated that she identified the body of Prudence during the post-mortem examination at University Teaching Hospital (UTH).

In cross examination, the witness told the court that a lot of people had already gathered at the time she went at the crime scene.

The ninth witness (**PW9**) was **Maggie Mwenya**. Her evidence was that on 12th July, 2015, whilst attending a funeral in garden compound, she received a phone call from her niece Prudence. She informed the court that the call was around 22:44 hours. The witness said Prudence sounded like she was panicking and her voice was trembling. She told the court that when she informed Prudence that she was not at home her reply was a quick "okay" and the line cut. PW9 said she came to learn of the demise of Prudence when she returned from the funeral house.

There were no issues raised in cross examination.

PW10 was **Bruce Kazadi Kanema**, the deceased's brother-in-law. His testimony was that on 12th July, 2015 he was with his cousin James Kunda at a bar in John Laing when they were joined by Prudence. The trio went to chat outside the premises. Whilst chatting, James and the deceased were embracing when Aloncias (PW1) saw them and went passed straight to his house. According to PW10, Prudence followed PW1 to his house. The witness testified that he also went to Aloncia's house to remind Prudence of their earlier discussion on facilitating for him to see his child. PW10 told the Court that as he was at PW1's house he did not observe anything unusual between him and Prudence and their conversation was cordial. He went on to testify that he left PW1's home at around 19:00 hours and he proceeded to his place with James.

Under cross examination, PW10 said that when Aloncias (PW1) went past them, he only saw James with the deceased and did not see PW10. He confirmed that Aloncias did not know James. The witness confirmed that he knew the accused persons as they lived in the same neighbourhood but he denied seeing them on the material date.

PW11 was **Matthews Chikabisa Zulu**, detective sergeant stationed at forensic sciences section. He said that in October, 2015, he was approached by two policemen with a request for him to conduct DNA tests on some samples. He said he advised

them to hand in the samples the following day but they omitted to do that. The samples were taken to the Food and Drugs analyst for analysis.

In cross-examination, he reiterated that he was not furnished with the samples for examination. He said the analysis was performed by the Food and Drugs department and the samples were disposed off there.

The last prosecution witness was detective sergeant **Joseph Phiri (PW12)** whose testimony was similar to that of PW7. He said that when a postmortem was conducted on the deceased, it revealed that she died from manual strangulation. The witness asserted that he also suspected that the victim was sexually assaulted before she was killed and he therefore submitted a swab to the state forensic department. PW12 explained that he expected the police officers from the state forensic department to submit the swab for DNA testing but when he returned to the department after some days, he was informed that he was the one expected to submit the samples. He was also informed that at that point the period within which the samples could be submitted had elapsed. The witness produced the post-mortem report as part of his evidence and it was marked as exhibit **'P5'**.

During cross examination, the witness stated that there were no tests conducted to establish whether it was Aloncias or the accused persons who sexually assaulted Prudence. He said nobody saw the accused persons kill the deceased.

In re-examination, PW12 explained that the question of whether the accused persons sexually assaulted Prudence would have only been ruled out if the blood samples from the accused were tested and found not to match the swab from the deceased.

After the close of the prosecution's case, I found that the state had established a prima facie case against the accused persons and I found them, with a case to answer. When put on their defence in compliance with section 291(2) of the Criminal Procedure Code, the accused persons elected to give sworn evidence and did not call any witnesses.

The first accused person in his testimony told the court that on 12th July, 2015 around 16:30 hours he accompanied A2 to African Braai who had be invited by his elder brother Humphrey Mundia. A1 narrated that they had a beer each whilst there and at about 19:00 hours A2's older brother told them to go home as it was getting late. A1 stated that on their way to A2's home he picked up a black nokia phone. A1 recounted that he was able to see the phone that was lying on

the ground along the gravel road because the area was well-lit by a light from the nearby shop. A1 stated that thereafter they proceeded to A2's house which was about 20 minutes away from his house. He said before he realised, it was 20:30 hours and so A2 advised him to sleep-over as it was a late hour to walk to his home.

A1 stated that the following day, he called Ricky using the phone he had picked and informed him that he had spent the night at Humphrey's house. He narrated that three days later, Ricky found the phone in the house and confronted the accused about where it came from. When the accused relayed how he obtained the phone, Ricky then offered to buy it and the accused sold it to him at K35. A1 testified that some days later he was told that Ricky was arrested in connection with the phone. He said that three days later, he travelled to Kafue to seek his uncle's opinion on how his ordeal could be handled and it was during his visit there that he was told the police were looking for him. It was his testimony that his uncle decided to hand him over to the police. He said he showed the police the location where he had found the phone. He also said he did not know Prudence before her death.

In cross-examination, the accused denied telling Ricky that he bought the phone from A2. According to him, he told Ricky that he picked the phone on his way home with Victor. In further

cross examination A1 told the Court that Ricky saw the phone he had picked after three days. He told the court that he did not know Prudence before his predicament.

The second accused in his testimony equally confirmed having been at African Braai with A1 and his elder brother on the material date. A2 testified that he left African Braai at 19:30 hours with A1. He said along the way, A1 saw a phone on the ground near a shop in the area and he took it. He said they then proceeded to A2's house. At around 20:30 hours A1 wanted to leave for his house but A2 advised him to spend the night as the area was not safe to walk through during night time. According to A2, the following morning the first accused used the phone that was picked to call Ricky to explain why he had not returned home the previous night.

The witness stated that on 10th August, 2015, he was apprehended by the police and taken to Chibolya Police Post. He said he led the police to the location where A1 picked the phone and their comment was that he had led them to a different spot from the one shown to them by A1. A1 insisted that he did not know Prudence or anything about how she was murdered.

In cross-examination, the second accused reiterated that it was the first accused who picked up the phone near a shop in their area.

After the close of the case, I only received written submissions from defence counsel.

On behalf of the accused persons, it was submitted that the evidence in the matter was circumstantial and the accused persons were linked to the offence by the phone. He submitted that the evidence was that Ricky Nayambepo was apprehended for using a phone which belonged to the deceased and he explained that he bought the phone from Davison Mtonga who had picked it in the company of Victor Mundia. Counsel implored the court to abide by the principles of circumstantial evidence as set out in the case of **David Zulu v The People**¹.

Counsel also submitted that the explanation given by the accused persons was that they merely picked the phone which explanation is reasonable and logical and therefore the court ought to give them a benefit of doubt. He further cited the case of **Saluwema v The People**² to support his argument that where a case is reasonably possible, although not probable, a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.

It was also canvassed on behalf of the accused herein that the murder could be attributed to PW1 who testified that he was with the accused and they engaged in an argument on the night of the murder. Counsel pointed out that if the police had conducted forensic investigation regarding the semen and fingerprints, Aloncias would have been apprehended as well. He implored the court to consider the evidence of the deceased's boyfriend who stood as the greatest suspect in the matter.

He concluded by submitting that the circumstantial evidence in the case was weak and raised several other inferences that could be drawn and therefore the court should acquit the accused persons.

I am indebted to counsel for his submissions and I have taken them into consideration in arriving at my decision.

I have considered the evidence led before me and I find that it is not in dispute that Prudence Lumano was discovered murdered in Chibolya compound on 13th July, 2015. According to the post-mortem report which was admitted into evidence as exhibit 'P5' the cause of Prudence Lumano's death was asphyxia and manual strangulation. The postmortem report equally showed that the deceased was sexually assaulted.

It is also my finding from the evidence before me that on 12th July, 2015 the deceased had spent some time with PW1 at his residence before they parted company at about 20:30 hours. It is further not in dispute that as per the MTN call record produced before Court as exhibit 'P2', Maggie Mwenya (PW9) received a phone call at 22:44 hours from Prudence on 12th July, 2015.

It is also common cause that on the same date, A1 whilst in the company of A2 gained possession of the deceased's phone. I also find that the said phone was later sold to Ricky Nyambepo (PW2) by A1.

What is in contention is whether the accused persons were responsible for the injuries caused to Prudence and her consequent death.

There is no doubt that the evidence against the accused persons is purely circumstantial as there is no direct evidence to the killing of the deceased. The legal position on circumstantial evidence can be derived from **Oxford's Dictionary of Law**³ which defines it in the following terms:

"Circumstantial evidence (indirect evidence); evidence from which the judge or jury may, infer the existence of a fact in issue but which does not prove the existence of the fact directly. Case law

has described circumstantial evidence as evidence that is relevant (and, therefore, admissible) but that has little probative value.”

The Supreme Court of Zambia in the case of **Danny Zyambo v The People**⁴ held as follows with regard to circumstantial evidence:

“Inference of guilt cannot be drawn from possession of stolen property unless it is the only inference that can reasonably be drawn. Where an innocent explanation might reasonably be true a fortiori the inference of guilt is not the only reasonable inference. If an accused gives an explanation which might reasonably be true, he has, as a matter of law, satisfied the Court that the case has not been proved beyond reasonable doubt and has discharged the obligation imposed on him.”

I also align myself to the holding of the Court of Appeal in **Saluwema v The People** where it was aptly stated that:

“If the accused’s case is reasonably possible although not probable, then a reasonable doubt exists and the prosecution cannot be said to have discharged its burden of proof.”

Further, the Supreme Court had this to say in the case of **Yotam Manda v The People**⁵.

“The Court is under a duty to consider various alternative inferences which can be drawn when the only evidence against the accused is that he was in possession of stolen property.”

In light of the guidance given by the Supreme Court in the above cited cases I must consider if there is something in the evidence adduced before me which positively excludes the less severe inferences against the accused persons (such as being in possession of property reasonably suspected of having been stolen or unlawfully obtained, rather than guilt on a major case of murder). I have therefore firstly considered the possibility that the deceased may have been killed by her boyfriend Aloncias (PW1) as alluded to by defence counsel in his submissions. PW1 in his testimony informed the court that he had engaged in an argument with Prudence that night. He said that they later reconciled and even had consensual sexual intercourse before Prudence eventually departed. This is supported by Bruce (PW10) who also confirmed that when he went to see Prudence at PW1's house on the date in question, the two were engaged in an amicable conversation. My assessment of PW1's version of events is that he had been consistent from the time he was interviewed by the police. I also had the opportunity to observe his demeanour in court and despite being subjected to rigorous cross examination his evidence remained unshaken. He made several admissions which were contrary to his interests and I have no hesitation in

adopting him as a substantial witness of truth. I consequently find no reason to believe that his testimony was not truthful.

I have also given consideration to the possibility that the phone in question came into the accused's possession otherwise than by the commission of the offence charged. The testimony of the accused adduced on the record is to the effect that they picked the phone on 12th July, 2015 around 19:30 hours. There is however uncontroverted evidence from PW9 that on the same day at 22:44 hours the deceased herein made a call to her. According to PW9 when she spoke to her niece she sounded panicky and ended the call abruptly upon learning that PW9 was attending a funeral away from her home. This evidence in my firm view clearly suggests that the phone was still in the possession of the deceased at the time the accused claim to have picked it at around 19:30 hours. In light of the foregoing I find the explanations by the accused herein not to be reasonably true and probable. Thus, the possibility that the accused person might have come into possession of the phone around 19:30 hours after it was abandoned by other unknown assailants is undoubtedly excluded.

Taking this matter further, it must be noted that the evidence of PW1 who was the last person to see Prudence on 12th July, 2015 reveals that, when she left his home at about 20:30 hours, she indicated that she would proceed to African Braai to

have some beers. The accused persons also admit being at African Braai on the night in question but stated that they left the bar at 19:00 hours to 19:30 hours and went straight home. It is abundantly apparent to me that the accused were being economical with the truth in their testimonies. This is so because of the glaring disparity between the evidence given by the accused before court and their statements to the police in terms of the time they allege to have left African Braai. In this regard I have attached less weight to their evidence. Furthermore, according to the testimony of PW7, the place where A1 is said to have picked the phone from was in close proximity to the point where the body of the deceased was found. From the foregoing facts, I find that having been in the area where the deceased was attacked and murdered, the accused persons had the opportunity and time to commit the offence.

I must also mention here that the conduct of the accused persons, upon knowing that PW2 had been apprehended in connection with the deceased's phone, left a lot to be desired. It is quite surprising that A1 immediately fled to Kafue, while A2 was very worried and terrified of simply going to the Police Station to clear his name. This behaviour in my opinion does not tally with the defence advanced by the accused persons to the effect that they were unaware of the killing of the deceased and had an innocent explanation for being in possession of her

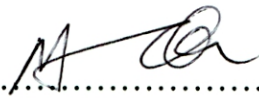
phone. It has also been shown from the evidence of PW2 and A2, that A1 had consistently lied about having obtained the deceased's phone from his co-accused. I note that the story that the phone was innocently picked by A1 whilst in the company of A2 only came to the fore after PW2 was nabbed. It is my affirmation that the conduct exhibited by the accused herein clearly points to the guilty knowledge connected with the deceased's phone. I am also satisfied that notwithstanding the fact that no forensic investigations were conducted regarding the semen, blood samples and fingerprints of all the suspects, there is overwhelming evidence against the accused persons as abovestated which offsets any prejudice they may have suffered by the failure to submit the samples for DNA analysis. Having excluded the other alternative possibilities as aforestated, the only irresistible inference that can be drawn on the facts laid before me is that of guilty.

The question is whether the accused intended to kill Prudence within the definition of malice aforethought in section 204 of the Penal Code. Considering the nature of the injuries sustained by the deceased; swollen face, cheek bites and mouth full of blood and bruises on the body, I am satisfied that they could have only been inflicted during a tussle by Prudence to escape. It is clear that since the victim died from manual strangulation, the accused persons had knowledge that strangling a person was likely to cause death.

In this matter, I have not established any extenuating circumstances which would reduce the capability of the accused persons. This is because, the evidence shows that A1 and A2 only drank a beer each and there is nothing on record to suggest that their actions were in a way impaired by the alcohol they consumed.

In the circumstances, I find the accused persons guilty of murder contrary to section 200 of the Penal Code and I convict them accordingly.

Delivered in open court this.....^{16th}..... day of.....^{June}.....2017.



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M.CHANDA
JUDGE