

HOLDEN AT NDOLA

(Criminal Jurisdiction)

**B E T W E E N :**

**WILLIAM MWELWA**

**Appellant**

**VS**

**THE PEOPLE**

**Respondent**

**Coram: Bweupe, D.C.J., Challa and Chirwa, JJ.S.**

**On 7th September, 1993**

**For the Appellant: Mr. Munthali, Principal Legal Aid Counsel**

**For the Respondent: Mr. Bwara, Assistant Senior State Advocate.**

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**JUDGMENT**

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**Bweupe, D.C.J. delivered judgment of the Court.**

**Cases referred to:**

**(1) Zulu -v- The People (1977) ZR at Page 151, Lines 1 - 12**

The appellant was charged with murder contrary to Section 200 of the Penal Code. The particulars being that he, on August 2, 1992 at Kabwe murdered Safineti Mfundaula. He was tried, convicted and sentenced to 15 years imprisonment with hard labour. He now appeals to this court against conviction only.

The facts of this case were to the effect that on the day in question the appellant and the deceased were seen drinking beer together at a beer party. PW1 who was coming from the beer party at which the appellant was seen holding the deceased in her arm pit heard the appellant saying to the deceased "let us go you are drunk." When PW1 asked the appellant where he was taking the deceased the latter said he was taking the deceased to her home. PW1 passed and went away. The following day PW1 was approached by PW3 who asked him if PW1 had seen his mother the deceased. PW1 told PW3 that in the evening he had seen the deceased with Mr. Mwelwa, the appellant now in this case who said he was taking her to her house. PW1 said he then showed PW3 the path the deceased and the appellant had taken.

PW2, Village Chairman at whose house the beer party was, said that he was approached by PW3 who said he had not seen his mother since the previous day. PW3 told him that when he, PW3, followed the path which PW1 had shown him he found at a certain place where the deceased had fallen, one chitenge material and a head dress. PW2 asked PW3 to check carefully where he found the materials. PW3 went back and returned crying and said he found his mother dead. Then PW2 went with him and others to the scene and at the scene he noticed where they had branched off the path, where she fell down and he saw some torn knicker and torn peticoat. PW2 also noticed some bruises because she was being dragged through thorn bushes. The dress she was wearing had blood stains and the injuries on the head and face. They went back to PW2's house and there sent for the appellant and at 1600 hours PW2 went to report the matter to the Police Station. PW2 further said under cross-examination that he saw the deceased and the appellant leaving the beer party together and that the appellant and the deceased used to be seen together at drinking places.

PW3 the son of the deceased said that on the 2nd August, 1992 he went to visit his friend and when he came back in the evening he noticed that his mother was not at home. The next day, when he found that his mother had not returned, he went to look for her. He approached PW1 who gave him some information which made him follow the path he was shown and eventually found the body of his mother in the garden where she was allegedly dragged. He observed that she had swollen legs, bruises on the face and blood in the ears.

PW4 said that on instruction of PW2 he went to the fishing camp where he apprehended the appellant. He said he did not see the appellant and deceased together at the beer party but when he asked the appellant about the deceased the appellant admitted to have moved with her from the beer party and that both were drunk.

In his evidence in defence the appellant said that on the day in question he went to the home of PW2 where the beer party was held. He bought some beer and went to join his friends. They sat in the shelter where other groups were sitting. They were there from

9.00 hours to 12 hours when the beer got finished. He then left the place and went home. The following day he went to Lusenfwa Fishing Camp to buy fish. It was there that four youths apprehended him saying he was wanted by PW2, the Chairman. On arrival he was badly beaten by the 4 youths and the Police Officers. After that the drunken Police Officers took him to the Police Station. He denied any knowledge of this offence saying that on the material day he did not see the deceased at the beer party and denied having known the deceased before.

The learned Principal Legal Aid Counsel, Mr. Munthali filed one ground of appeal which was to the effect that the learned trial Judge misdirected himself by drawing an inference of guilt from circumstantial evidence which was manifestly weak. He vividly argued and argued with much force that the appellant was convicted of murder on circumstantial evidence which the trial judge rejoicingly declared sufficient to draw an inference of guilt. He relied on the evidence of PW1 and PW2 to the effect that the appellant was the last person seen with the deceased. He submitted that the inference of guilt in those circumstances is untenable. He referred the court to ZULU VS THE PEOPLE(1). He said the case cited was on all fours with the present case and conviction of the appellant for murder cannot in the circumstances be upheld.

The learned Senior Advocate supported the conviction, said Zulu's case is distinguishable from the instant case in that Zulu was last seen with the deceased he gave an explanation of how he came to sustain the injuries he had which evidence was accepted by the prosecution.

We have carefully considered the evidence before the Court below and the submissions advanced by the learned Principal Legal Aid Counsel. We agree with the findings of the court in Zulu's case that it is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of the matter at issue but rather its proof of facts not in issue but relevant to the facts in issue and from which an inference of the facts in

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issue may be drawn. In this case there was no direct evidence that the appellant killed the deceased. There was however, circumstantial evidence that PW2 saw the appellant and the deceased leaving the beer party together and evidence PW1 gave that he saw the appellant holding the deceased in her armpit and heard the appellant saying to the deceased "let us go you are drunk". And that when PW1 asked the appellant where he was taking the deceased the appellant replied he was taking her to her house. But the deceased never reached her house and she was found dead along the path PW1 saw the appellant and deceased going. On this established fact the learned trial judge drew an inference. The appellant's defence was total denial. He denied that he ever saw the deceased at this beer party and denied he had ever known the deceased at all.

We have considered the case of Zulu cited and we agree with the learned Counsel, Mr. Gwara that that case is distinguishable from the case at hand. It is distinguishable in that, in Zulu's case, he (Zulu) gave an explanation that he sustained the injury at work which explanation was not rebutted by the prosecution. In the instant case the appellant's explanation is a total denial of facts deposed by PW1 and PW2. We are of the view that Zulu's case is not in all fours with the facts established in the case at hand and we have no reason to hold otherwise. The appellant was last seen with the deceased by PW1 and PW2 and the appellant has not given an explanation how he parted company with the deceased.

For the foregoing reasons it is our considered view that the circumstantial evidence received at the trial was tenable and safe and we can with confidence say that the danger of erroneous inference was neither here nor there. We find the conviction safe and satisfactory and consequently uphold the learned trial judge.

The appellant was sent to 15 years imprisonment with hard labour on the ground that he had drunk some beer at the time. The question that has exercised our minds is whether or not drunkenness would provide extenuating circumstances so as to come within the ambit of Act 3 of 1990. We are of the view that if anything drunkenness is an aggravating circumstance, not extenuating circumstance.

Fifteen years imprisonment with hard labour was therefore based on a wrong principle and cannot be allowed to stand. We set it aside and direct that the appellant should suffer a sentence of death, the appellant be hanged by his neck until he dies. We however, pray that this is a proper case for Mr. President to exercise his prerogative of mercy on the appellant.

B. K. Bweupe  
DEPUTY CHIEF JUSTICE

M. S. Challa  
SUPREME COURT JUDGE

D.K. Chirwa  
SUPREME COURT JUDGE

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

VILLAGE HEADMAN MWANAMBINYI  
(ALIAS DICKSON MWANGALA)

Appellant

and

ZAMBIA CONSOLIDATED COPPER MINES  
LIMITED

Respondent

Coram: Bweupe, D.C.J. Sakala and Chirwa, JJ.S

On 2nd September, 1993

For the Appellant: Mr. Nosiku Kawanambulu of Nosiku Kawanambulu & Co.

For the Respondent: Mr. E.M.S. Sifanu, ZCCM Legal Counsel

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JUDGMENT

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Bweupe, D.C.J. delivered the judgment of the Court

This is an appeal against the decision of the learned High Court Judge allowing the appeal against the decision of the learned District Registrar striking out the defendant's statement of defence on account that it did not disclose triable issues.

The appellant has filed and argued four grounds of appeal. The learned Counsel for the appellant, Mr. Kawanambulu has argued that the Defendant's defence is bad and consequently does not raise triable issues.

Mr. Sifanu on the other hand, has argued that triable issues have been raised which would entitle the Court to order that the case should proceed to trial.

We do not intend to dwell upon all the arguments raised but suffice it to say that we have carefully considered the defence filed and arguments submitted for and against and, taking into

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account the totality of the matters pleaded such as ownership of the land, matters disclosed but not disposed of in the Subordinate Court judgment relied upon, we are of the view that triable issues have been adequately raised.

Having therefore heard the appellant's Counsel and considering the Plaintiff's statement of claim and the Defendant's defence we are of the view that triable issues have manifested in this case for the parties to proceed with the trial. We have no reason to upset the judgment of the court below.

In the circumstances, the appeal is dismissed and direct that the case must proceed in the usual way that is as the order of direction has already been made, that order should be followed.

B. K. Sweipe  
DEPUTY CHIEF JUSTICE

E. L. Sakala  
SUPREME COURT JUDGE

D. K. Chirwa  
SUPREME COURT JUDGE