

IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Criminal Jurisdiction)

BETWEEN:

BERNARD MULENGA

APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram: Phiri, Muyovwe and Chinyama, JJJS
On the 5th December, 2017 and 11th December, 2017

For the Appellant: Mr. P. Chavula, Senior Legal Aid Counsel,
Legal Aid Board

For the Respondent: Ms. M. H. Kayombo, Senior State Advocate, National
Prosecutions Authority

JUDGMENT

Phiri, JS, delivered the Judgment of the Court

Cases referred to:

1. **Mutale and Phiri vs. The People (1995/1997) Z.R. 227**
2. **Saluwema vs. The People (1965) Z.R. 4**

The appellant was tried by the High Court at Kitwe and convicted on a charge of **Murder contrary to Section 200 of the**

Penal Code Chapter 87 of the Laws of Zambia. The particulars of the charge alleged that on 16th September, 2014 at Kalulushi he murdered Gladys Kachindila. He was sentenced to death. When we heard the appeal on 5th December, 2017, we allowed the appeal and acquitted the appellant. We said we would give our reasons later and this we now do.

The undisputed facts were that the appellant and the deceased were husband and wife. They lived at a farm house and had no child or dependant. The prosecution's case was that on the material day the deceased was at a beer drinking place, and was seen by PW2 and PW3 around 18.00 hours drinking beer and dancing to music. When the appellant saw her, he bought a 2.5 litre container of opaque beer and got hold of her hand and led her on the road to their home as it was getting late.

Later during the night PW4 the Chief's Retainer who was in a motor vehicle carrying Government officials from the Department of Agriculture, saw the appellant and his wife (now the deceased) along the road. According to PW4, the motor vehicle was stopped and using the vehicle's lights, he was able to recognize the appellant

and his wife who was lying down on the ground while the appellant stood next to her. When PW4 inquired from the appellant and his wife if they needed a lift to their home which was in the same direction, the deceased's reply was that she was better left alone as she was fine. The appellant indicated to PW4 that his wife was too drunk to move. Thereafter, PW4 and his team drove off as their assistance was not needed.

The appellant's version of events, which was not believed by the learned trial Judge, was that when he could not conveniently move the deceased on their way home after PW4 left, he left the deceased lying down and walked a considerable distance to PW1's house to seek help as the deceased kept falling down. When the appellant arrived at PW1's house and sought assistance, PW1 who was the deceased's brother, refused to render immediate help. The appellant then returned to the place where he left the deceased lying down on the road. He found that she had moved on her own covering a distance of about 50 meters before she fell down again. He picked her up and laboured to walk her up to their house. As he helped the deceased to enter their house, the deceased lost her

balance and fell on the door step. The door step was shown in the exhibited photographic evidence which he identified during trial.

When the deceased fell down at the entrance door, the appellant pulled her inside the house and applied cold water to her head. When he noticed that her condition was not getting any better, he went to report to PW1. When the appellant returned to the house in the company of PW1 and PW2 who joined them, they found the deceased dead. The appellant's explanation, in his defence, was that the deceased used to drink beer excessively and he previously sought counseling from their Church which yielded no results. According to the appellant, his wife died from injuries sustained when she fell down on the door step. He also denied that he tried to escape.

The learned trial Judge found as a fact that there was no fight between the appellant and the deceased during their walk from the beer drinking place up to their house. She also found that all household items bore no sign of struggle. The learned trial Judge further found as a fact that the exhibited broken sticks were not used by the appellant to hit the deceased.

This notwithstanding, the learned trial Judge concluded that the appellant caused the injuries from which the deceased died and that he did so with malice aforethought. Thus, she convicted the appellant for the offence of murder.

Dissatisfied with the conviction, the appellant launched his appeal in this Court advancing three grounds, as follows:

- 1. The learned trial Judge erred in law and fact by convicting the appellant based on circumstantial evidence when it was clear that there was more than one reasonable inference which could be drawn from the said circumstantial evidence.**
- 2. The learned trial Judge erred and misdirected herself both in law and in fact in convicting the appellant when she had in fact entertained serious doubts in her mind.**
- 3. Alternatively, the learned trial Judge erred and misdirected herself both in law and fact when she found that there was malice aforethought in this matter.**

In support of the three grounds of the appeal, written heads of argument were filed on behalf of the appellant. In response, the learned Senior State Advocate equally filed written heads of argument. However, at the hearing of the appeal on the 5th December, 2017, Ms. Kayombo, the learned Senior State Advocate, very correctly stated that she was no longer supporting the appellant's conviction; and conceded that the circumstantial evidence against the appellant was not of such quality that it could lead to only one conclusion that the appellant was guilty of the murder of his wife. We agreed with Ms. Kayombo's position.

The paragraph that sums up the lower Court's approach to the circumstantial evidence against the appellant in this case is at page 119 of the record of the appeal (Lines 20-25). It reads as follows:

"The evidence on record shows that the accused and the deceased were staying just the two of them in their house and that there were no other people staying nearby. Therefore, considering how the accused was seen pulling the deceased from the bar to go home, the logical conclusion was that it was Mr. Mulenga who killed her".

The lower Court's conclusion was arrived at notwithstanding its earlier findings of fact to the effect that there was no fight between the appellant and the deceased, and that the appellant did not hit the deceased with the broken sticks which were alleged to

have been used by the appellant. Clearly, the lower Court's conclusion was based on assumptions which were not supported by the evidence. The conclusion was perverse as it was made in the absence of any relevant evidence. Clearly the trial Court's conclusion was a misdirection. It was on this basis that we gladly accepted Ms. Kayombo's change of position and acquitted the appellant and set him at liberty forthwith. Ms. Kayombo's changed position was in keeping with the principle of law which we emphasized in the case of **Mutale and Phiri vs. The People**⁽¹⁾ when we said:

"Where two or more inferences are possible, it has always been a cardinal principle of law that the Court will adopt the one that is more favourableto an accused if there is nothing to exclude that inference. Where there are lingering doubts, the Court is required to resolve such doubts in favour of the accused".

In the present case, there is evidence to establish that drunkenness was prevailing upon the deceased all the way from the beer drinking place where she was found by the appellant. There is also evidence to establish that along the way she kept falling to the ground. There was a high probability that the injuries she sustained were as a result of repeatedly falling to the ground. PW4 an independent witness who last saw the deceased alive during the

same night, testified that he found her lying on the ground. He talked to her and offered her a lift which she declined. These facts certainly raise another inference which exonerates the appellant and makes his explanation of the events reasonably possible; and, if the appellant's case is reasonably possible, then a reasonable doubt exists, and the prosecution cannot be said to have discharged its burden of proof (**see Saluwema vs. The People⁽²⁾**).

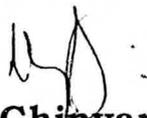
For the foregoing reasons, we allowed this appeal and quashed the death sentence and set the appellant at liberty.



G. S. Phiri
SUPREME COURT JUDGE



E. N. C. Muyovwe
SUPREME COURT JUDGE



J. Chinyama
SUPREME COURT JUDGE