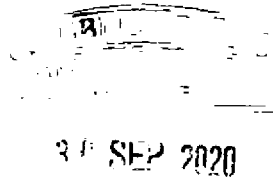


**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA**

(Criminal Jurisdiction)

BETWEEN:

MASAUO ZULU



APPELLANT

AND

THE PEOPLE

RESPONDENT

Coram : Phiri, Muyovwe and Lisimba, JJS

On 4th December, 2012 and 30th September, 2020

**For the Appellant: Mr. I. Chongwe, Senior Legal Aid
Counsel of Legal Aid Board**

**For the Respondent: Mr. C. Bako of National Prosecutions
Authority.**

JUDGMENT

PHIRI, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Phiri and Others v The People (1973) ZR 47.**
2. **DPP v Goodwell Siwale (1981) ZR. 71**
3. **David Zulu v The People (1977) ZR. 157.**
4. **Justin Mumbi v The People (2004) ZR, 106**

The delay in delivering this judgment is regretted. When we heard this appeal, we sat with Hon. Mr. Justice Lisimba who has since retired.

This is an appeal against the judgment of the Hon. Madam Justice G. M. Salasini by which judgment the appellant was convicted for the murder of Tichoke Tembo. The offence was committed on the 21st August, 2010 at Chipata District of the Eastern Province. He was sentenced to 20 years imprisonment with hard labour on account of drunkenness as an extenuating circumstance.

The prosecution evidence was anchored on the testimony of eight (8) witnesses whose evidence was circumstantial in nature. PW1 the deceased's elder sister testified that the deceased left their village, Ndelendele, at 15:00 hours to attend a choir practice at Muchacha village. The deceased never returned to her house. She was killed along the way and her remains were discovered in a ditch which was about ten (10) meters away from the footpath to Ndelendele village. It happened that around about 08:00 hours earlier in the morning of the same day, the appellant borrowed PW2's bicycle to use. He disappeared with it. PW2 needed his bicycle back

J3

and made three attempts to retrieve it from the appellant without success. He sought assistance from the appellant's sister who also failed to retrieve it. PW2 eventually got back his bicycle at about 22:23 hours from Michael Zulu (PW3) who was in the company of Pashane Phiri (PW4) and a neighbor Aaron Ngoma.

According to PW3 and PW4, they were on their way to see a girl friend at Chiyali village around 19:00 hours in the company of Aaron Ngoma. As they moved along a footpath, they came across a bicycle and a pair of shoes which were lying abandoned. They left those items on the same spot as they imagined that the owner was within the surroundings. At about 23:00 hours the trio were on their way returning from Chiyali village when they spotted the abandoned bicycle and the pair of shoes on the same spot they had earlier seen the items. Since they recognized the bicycle as belonging to PW2, they took it to him at about midnight. Later, they came to learn that Tichoke Tembo had been murdered near the point where PW2's bicycle was recovered together with the appellant's pair of shoes that was abandoned. The body was identified by PW5 Dorika Miti who also attended the postmortem examination.

PW6 and PW7 were the last people to see the deceased alive because the deceased passed by their house on her way back from choir practice before 18:00 hours. The deceased asked for some vegetables which they gave her. The next day, PW6 and PW7 learnt that the deceased never reached her home. PW6, PW7 and two other people then decided to look for the deceased and decided to walk along the route she had taken between Khali village and Ndelendele village. They spotted the deceased's head dress and some dragging marks on the ground which led them to an anthill. They discovered the deceased's body in a ditch behind the anthill. The deceased still had the plastic bag of vegetables she was given.

The killing was reported to the Police who apprehended the appellant and charged him with murder. The Police took possession of the bicycle which was identified by PW2 and the pair of shoes which was recognized as belonging to the appellant. The postmortem examination report listed the cause of death as intra-abdominal bleeding and intracranial hemorrhagia. Her frontal cerebral lobe had a fractured bone and her spleen was ruptured.

When put on his defence, the appellant confirmed that he borrowed and used PW2's bicycle which he used on his way to drink beer. He claimed that along the way, he was attacked by unknown people who threw some objects at him forcing him to abandon his shoes and PW2's bicycle at the scene where they were found. He later around 04:00hours attempted to recover those items at the scene of the attack but did not find them. He insisted that he knew nothing about the killing of the deceased.

The trial court considered the evidence received and disbelieved the appellant's story. The court found the appellant's explanation of how he abandoned PW2's bicycle and his own shoes near the scene of crime while being drunk, to be an afterthought. The trial court found the circumstantial evidence against the appellant to be strong and compelling. Thus, he was convicted of murder. After the conviction the court invited the appellant's Counsel to mitigate on his behalf. In the mitigation, the appellant was said to be first offender, a young man who had been drinking all day and that the evidence of drinking should be considered an extenuating factor.

The court agreed with the mitigation statement and adjudged that the appellant was entitled to leniency and sentenced him to 20 years imprisonment with hard labour.

The appellant was unhappy with both conviction and sentence and appealed to this court canvassing three grounds of appeal couched as follows:

- 1. The learned trial court erred in fact and law when it convicted the appellant for the offence of murder in the absence of cogent circumstantial evidence.**
- 2. The learned trial court erred in law and fact when it held that the finding of the appellant's pair of shoes and the bicycle near the place where the body of the deceased was found clearly raised a reasonable inference that he caused the death of the deceased.**
- 3. The learned trial Judge misdirected herself when she convicted the appellant without entering a verdict of guilty in respect of the said conviction.**

In support of the appeal, Mr Chongwe filed written heads of arguments upon which he relied. In support of ground one, his

submission was that the evidence against the appellant was neither overwhelming nor cogent to warrant the finding that he was guilty beyond reasonable doubt; that PW6 the deceased's sister who last saw the deceased around 18:00 hours was a suspect witness.

In respect of ground two, Mr. Chongwe submitted that the trial court should have considered and appreciated the fact that the appellant was drunk at the time he abandoned PW2's bicycle and his own shoes after he was attacked and that the recovered items alone should not have led to the conclusion that the appellant was guilty.

In support of this argument Mr. Chongwe cited the case of **Phiri and Others v The People** ⁽¹⁾.

In support of the third and last ground of appeal Mr. Chongwe referred us to page 145 of the record of proceedings where the trial court recorded the following:

"I therefore convict him accordingly."

According to Mr. Chongwe, there was failure by the trial court to make a verdict. He cited the case of **DPP v Goodwell Siwale** ⁽²⁾ in which we held that failure to record a verdict rendered a trial a nullity.

Mr. Chongwe submitted that the trial court in the present case failed to enter the verdict and, like wise, this rendered the trial a nullity.

In response Mr. Bako supported the appellant's conviction. Mr Bako submitted that the appellant was connected to the scene of crime by the bicycle and his own shoes which were found abandoned near the deceased's body; that his explanation that he was attacked by unknown people was an afterthought because he did not seek help from other villagers. In support of this argument, Mr. Bako referred us to the case of **David Zulu v The People**⁽³⁾.

We have considered the three grounds of appeal and the submissions made. We have also examined the judgment of the lower court. It is clear to us that the court below based the conviction on circumstantial evidence triggered by the evidence of PW3 and PW4 and the finding of incriminating evidence in the form of the bicycle which the appellant borrowed from PW2, and the appellant's own shoes, 30 meters away from the ditch where the deceased's body was discovered. We have stated it, time and again that strong and compelling circumstantial evidence will support a conviction.

In the present case, the appellant put himself at the scene of crime, albeit with an explanation that he was equally attacked by unknown people who threw some objects at him.

The villagers and the Police officers who visited the scene, never found such objects at the scene where the bicycle and the shoes were found. In addition, there were other compelling odd coincidences that tend to seriously implicate the appellant. First, he never reported about the abandoned bicycle to PW2 its owner. He never sought help from other villagers; his shoes were found 30 meters from the deceased's body; the deceased's body was dragged from the footpath which she had used and the appellant had also used during the same night. In our considered view, the deceased was brutally killed in a carefully planned attack in which the appellant is very connected by circumstantial evidence. We do not find any basis for the suggestion that PW6, the deceased's sister was a suspect witness. We agree with Mr Bako that the circumstantial evidence against the appellant was overwhelming. We find no merit in grounds one and two of the appeal.

In regard to ground three which alleges that the lower court did not enter the verdict of guilty in respect of the conviction, we note

from page J8 of the judgment that the lower court, after analyzing the evidence, concluded that;

“I believe his story is merely a fabrication to conceal his guilt for the death of the deceased...” “... I therefore convict him accordingly.”

It is clear to us that the court convicted the appellant after finding him guilty of the murder of the deceased. We do not find any validity in the complaint that there was no verdict. We equally find no merit in the 3rd ground of the appeal and we dismiss it.

Before we conclude, we note that the trial court did not pass the mandatory sentence of death on the ground that there was drunkenness on the part of the appellant when he committed the offence. In the case of **Justin Mumbi v The People** ⁽⁴⁾, we held that:

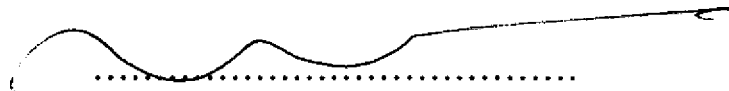
“Drunken circumstances generally attending upon the occasion, sufficiently reduce the amount of moral culpability so that there is extenuation.”

In the present case apart from the appellant's own claim that he drunk beer, there was no evidence of drinking beer or that drunkenness attended the occasion where the deceased was killed. We therefore find that on the facts of this case there was no extenuation. We accordingly set aside the sentence of 20 years

imprisonment with hard labour and reinstate the mandatory capital punishment.



.....
G.S. Phiri
SUPREME COURT JUDGE



.....
E. C. Muyovwe
SUPREME COURT JUDGE