IN THE SUPREME COURT OF ZAMBIA **APPEAL No.38/2019**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

KETSON MPUNDU **APPELLANT**

V

THE PEOPLE **RESPONDENT**

Coram: Muyovwe, Hamaundu and Chinyama, JJS
On 2nd June, 2020 and 14th August, 2020

For the Appellants : Mrs. M. K. Liswaniso, Legal Aid Board

For the State : Ms N. T. Mumba, Chief State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

This appeal is against conviction.

The appellant was charged with the offence of murder in the High Court held at Kasama, presided over by Ngulube, J. (as she

then was). It was alleged that on 2nd August, 2011, in Chilongoshi village in the District of Kasama, the appellant murdered his wife named Winfridah Sichikolo.

The case against the appellant was this:

In the night of the 2nd August, 2011, residents of the village were awakened by the appellant who went round the village wailing, and shouting that his wife had hanged herself. The first to arrive at the appellant's house was the deceased's mother, PW1. This witness, assisted by the appellant, brought down the body from its hanging position and laid it on the bed.

At the trial, PW1 witness told the court that she did not believe her son-in-law's explanation that her daughter had hanged herself because of the observations that she made in the house and on the body of the deceased. She told the court, for instance, that her daughter was hanging against the wall, naked, and that she observed that her feet were partly resting on a stack of bags of grain. She told the court that she made the following further observations; that the deceased was hanging by a length of cloth from her husband's pair of trousers; that the length of cloth was not really tight around the neck, but was hanging on something at the

nape of the neck; and that, the left side of the ribs were swollen, the body was swollen everywhere and some of the private parts had been removed.

After the body was brought down, the police were called. Inspector William Kanyembo, PW3, who later became the arresting officer, went to the scene, with other officers. This witness, as well, told the court that, at the scene he noted certain things that were inconsistent with suicide by hanging. Among the observations he pointed out to the court were the absence of the usual defecation, passing of urine and protrusion of the tongue. He, too, observed the swelling of the left side of the ribs. The witness told the court that it is these observations that made him place the appellant into custody, as he suspected foul-play.

The findings on postmortem examination were that the deceased was strangled.

The appellant maintained that his wife had hanged herself. He told the court that, the previous day, he had come back home only to find his wife in a sullen mood. He said that they had retired to bed, with the wife still in that mood. That he had woken up in the

middle of the night only to find her hanging from the roof in the next room.

The trial judge treated PW1, the deceased's mother, as a witness with a possible interest to serve. The judge warned herself as to the need for PW1's evidence to be corroborated by some other evidence. She found corroboration in the testimony of the arresting officer, PW3, who had also observed the swelling on the left side of the deceased's ribs. She further found corroboration in the postmortem report, and the testimony of the Pathologist, PW4, who confirmed that the deceased died of strangulation, and not hanging. Accordingly, the judge found that the deceased did not commit suicide; but was strangled to death.

As to the perpetrator of the crime, the judge had no difficulty in finding that it was the appellant because it was common cause that the appellant had been the only person in the house with the deceased; and that there had been no sign of the house having been broken into.

The appellant was then convicted and sentenced to death.

In the first ground of appeal, the appellant contends that the trial judge misapplied the law on corroboration. Two arguments

have been advanced on this ground. One of the arguments is puzzling. Mrs. Liswaniso, for the appellant, argued that there were inconsistences in the testimony of PW1 as regards the position in which she found the deceased in the house. Counsel further drew our attention to PW1's testimony that she had observed the swelling on the left side of the ribs; and that some of the private parts had been removed. Counsel submitted that, because the Pathologist did not make these observations in his report, it went to show that PW1 was hell bent on implicating the appellant; and was willing to fabricate evidence to do so. Counsel argued that this should have alerted the trial judge that the particular witness was untruthful, so that the judge should have looked for something more to satisfy herself that it was safe to convict on PW1's testimony. We find this argument puzzling because the learned judge did treat PW1 as a witness with an interest to serve. This shows that she was alive to the danger that Mrs. Liswaniso is pointing out. In the end, the trial judge found it safe to rely on PW1's testimony because she was of the view that it had been corroborated by that of the arresting officer and the Pathologist. In our view, therefore, this argument is misconceived.

The second argument, as we understand it, is this: That, according to counsel for the appellant, the learned trial judge based her conviction on the testimony of PW1. Mrs. Liswaniso argued that the trial judge should have gone on to set out whatever it was that satisfied her that the danger of false implication had been excluded.

Ms Mumba, on behalf of the State, submitted that while the trial judge may not have expressly stated that she had found as a fact that the danger of false implication had been excluded, she had nevertheless addressed the issue regarding corroboration.

We must point out that it is not correct to suggest that the conviction in this case rested entirely on the testimony of PW1. Had that been the case, we would agree that there would have been need for the trial judge to set out pieces of evidence, or circumstances, which satisfied her that the danger of false implication had been excluded. In this case, however, PW1 was not the only witness whose testimony seemed to suggest that the deceased did not hang herself. The arresting officer, PW3, had similar observations. The opinion of the Pathologist, PW4, also was that the deceased did not hang herself, but was strangled. So, the judge could easily have made a finding that the deceased was strangled on the testimony of

PW3 and PW4 only, without even considering that of PW1. The opinion of PW4 alone was also sufficient for the judge to make a finding that the deceased was strangled. Now, as the learned trial judge found, the testimony of the two witnesses corroborated that of PW1. Hence that was all that was needed to satisfy the court that PW1's testimony could be relied on as well. Our view therefore is that the second argument is also misconceived.

We therefore find no merit in the whole of the first ground of appeal.

In the second ground of appeal the appellant contends that the trial judge erred in law when she relied heavily on the testimonies of PW1, PW3 and PW4; when those testimonies were full of inconsistences.

This ground was argued together with the first ground. While counsel for the appellant argued a great deal on corroboration, which was raised in the first ground of appeal, no specific argument appears to have been made on this ground. In any event, we do not see any inconsistencies in the testimonies of those witnesses. Instead what we see is that they supported each other in their

common position that the deceased did not hang herself, but was strangled. We, therefore, find no merit in this ground.

The third ground is couched as follows:

> **"The learned trial court erred in law and fact by convicting the appellant when it was not proved that he actually caused the death of the deceased."**

In this ground, counsel attacked the conclusion arrived at by the Pathologist, PW4, and blamed the trial judge for relying on it. Mrs. Liswaniso argued that the presence of air bubbles on the side of the skin under the head, the blood in the deceased's eyes and the blue colour of the fingers which PW4 relied on for his opinion that the deceased was strangled were symptoms of air constriction in the wind pipe, which could also occur in suicide hangings. She went on to blame the trial judge for ruling out suicide upon reliance on testimony which said that the length of cloth used did not touch the nape of the neck. She submitted that, in so doing, the trial judge did not address herself to what is known as incomplete or partial hanging. With that submission, counsel embarked on what her opponent, Ms Mumba, described as a lengthy lecture on the different types of hangings and strangulations. She concluded by

submitting that, rather than relying on the testimonies of PW1, PW3 and PW4, the trial judge should have perused general medical literature.

Ms. Mumba, for the prosecution, argued that opinions on medical issues are for medical experts and not for counsel or the appellant. She submitted that opinions on issues such as the different types of hangings and strangulation should have been elicited from PW4, when he was in the witness box.

We do not hesitate to agree with the submissions by the prosecution. It is not competent for counsel to argue and express opinions on medical subjects, even if he or she derives their opinions from what they have read in medical literature. Neither is it competent for the court to draw conclusions on medical issues, or indeed issues in other fields that require expert opinion, based solely on the literature that the court has read in those fields. The types of hangings and strangulations should have been placed on record through PW4, or some other Pathologist, before counsel could raise arguments on them.

As matters stand in this case, however, there was no other medical opinion on which the trial judge could have relied in order

to reject PW4's conclusion that the deceased was strangled. Besides, the trial judge made her finding based on a combination of PW4's opinion and the evidence at the scene of crime, such as the evidence that the length of rope was not tight round the neck, the presence of the bags of grain in the room, and the question that, if there were no bags of grain in the room, how then did the deceased manage to hang herself from the roof. So, we find no fault with the reasoning by which the trial judge came to the conclusion that the deceased was strangled. We, therefore, find no merit in this ground either.

Overall, the appeal has no merit. We dismiss it

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E. N. C. Muyovwe
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. Chinyama
SUPREME COURT JUDGE